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No. 80-1852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. MCGOFF, GLOBAL COMMUNICATIONS CORPORATION AND SACRAMENTO PUBLISHING COMPANY,

Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether an individual and two corporate entities, all active newspaper publishers, subpoenaed by a government agency, can be totally barred from any discovery relating to non-frivolous allegations of agency bad faith or improper purpose, particularly when the subpoenas seek documents directly related to their First Amendment protected activities (including the writing of political and news commentary and the publishing of newspapers).

2. Whether an administrative subpoena that impinges upon First Amendment interests may be enforced despite the agency's failure to demonstrate either that the subpoena is substantially related to a compelling governmental purpose or that it is the most narrow means of achieving that purpose.

PARTIES

The following is a list, pursuant to Supreme Court Rule 28.1, of all subsidiaries and affiliates of Global Communications Corporation and Sacramento Publishing Company:

(a) Star Newspaper Company

(b) Sierra Publishing Company

(c) The Sacramento Union Corporation

(d) American River Press, Inc.

(e) S.P.C. Publishing Company

(f) Fresno Publishing Company

(g) Telegraph-News Publications, Inc.

(h) Water's Edge, Inc.

(i) Satellite Steamship Co., Ltd.

(j) Forlow Travel Corporation

(k) Sunsea Travel Systems, Inc.

(l) Beaver Island Boat Company

(m) Samaru Shipping, Inc.

(n) Protea Land Company, Ltd.

(o) Panax Corporation

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The orders of the United States District Court for the District of Columbia (1) enforcing three administrative subpoenas *duces tecum*, and (2) granting the Securities and Exchange Commission's motion for a protective order against discovery are not reported, but are attached hereto at App. 17a-18a. The opinion of the United States Court of Appeals for the Distrit of Columbia Circuit is not yet reported, but is attached hereto at App. 1a-16a.

JURSIDICTION

The opinion and order of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-16a), affirming the orders of the district court, was entered on February 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

This case involves the judicial enforcement of three sweeping subpoenas *duces tecum*, issued on July 13, 1979 by the Securities and Exchange Commission ("SEC"). The subpoenas were issued to Petitioners John P. McGoff, Global Communications Corp. ("Global") and Sacramento Publishing Co. ("Sacramento"), all of whom were and are actively engaged in the newspaper publishing business. Indeed, the court of appeals in its opinion described Mr. McGoff as "the self-made helmsman of an extensive newspaper publishing and printing network." App. 3a. He is the sole owner of Global, which in turn wholly owns Sacramento. *Id.* Neither Global nor Sacramento has registered, or is required to register, its stock with the Securities and Exchange Commission.

As outlined by the court of appeals, the three SEC subpoenas demanded that Mr. McGoff, Global and Sacramento each produce "any and all documents [for the

period January 1, 1971 to date] concerning or involving . . . directly or indirectly" the following categories of information:

> (1) any transactions, contacts, or dealings with the South African government or its political subdivisions; South African officials, political candidates, or political parties; and seven named South African political figures,
>
> (2) any receipts or disbursements of South African funds,
>
> (3) any transactions or proposed transactions involving the securities of Panax, Global, Sacramento, Star Newspaper Co. (the predecessor of Global), or the Suburbia newspapers,
>
> (4) any transactions with the Union Bank of Switzerland or Thesaurus Continental Securities Corp. (the Swiss entities that allegedly funneled the South African funds to McGoff),
>
> (5) the incorporation and capitalization of Global and its predecessor Star,
>
> (6) any contacts or dealings concerning the proposed acquisition of the *Washington Star,* and
>
> (7) any contacts or dealings concerning the acquisition or disposition of the *Sacramento Union* or Suburbia newspapers.

App. 6a. Thus, by these subpoenas, the SEC has demanded that Petitioners bare to the Government any private political associations the Government believes they

had with the Republic of South Africa, or similar dealings that the Petitioners have had pursuant to their news publishing activities. Moreover, the SEC is asking Mr. McGoff to disclose to it – through the device of these subpoenas – *why* he made various publishing decisions, *why* he decided to publish a newspaper in Washington, D.C., *how* he intended to use that publication, if at all, in the context of his conservative political views, and other decisions that go to the heart of a newspaper publisher's activities. Finally, the SEC would have Mr. McGoff disclose the financial arrangements, if any, he made for the attempted purchase and purchase of two major newspapers, merely to satisfy its curiosity as to the financial support, if any, a newspaper publisher had for his activities.

The SEC premised its ability to demand such information from a newspaper publisher regarding wholly-private news-related transactions, as to which he had no obligation to report in any required SEC filing, on the ground that Mr. McGoff was required to file, and did file, a Schedule 13D as required by the Williams Act, 15 U.S.C. § 78m(d), regarding his stockholdings in a publicly-registered stock company, Panax Corporation ("Panax"), which Mr. McGoff heads as President.[1] App. 4a. The SEC asserted that it was investigating whether Mr. McGoff had misrepresented the source of funds used for his purchases of Panax stock, or whether he had any con-

[1]The Williams Act requires certain disclosures by stockholders who own more than five percent (5%) of the outstanding stock of a public company. Among other things, the Act requires disclosure of the identity and background of the purchaser, the source of funds used for the stock purchase, and any contracts, arrangements or understandings between the purchaser and others with respect to the stock being purchased.

tracts, arrangements or understandings with undisclosed parties with respect to the Panax stock.[2] The SEC did not assert that it had any regulatory authority over Mr. McGoff's private political affairs or his business affairs unconnected to Panax. Nevertheless, the major thrust of the SEC's document demands was disclosure of the details of these otherwise private matters.[3] Objecting that the subpoenas were overbroad under both the First and Fourth Amendments, the Petitioners refused to comply. The SEC subsequently filed its application to enforce the subpoenas.

Almost simultaneous with the SEC's information demand, two other federal agencies instituted investigations or took action against Mr. McGoff. Beginning in November, 1978 and continuing to this date (see App. 44a-47a), the Department of Justice has systematically leaked the progress of a confidential grand jury investigation (involving the same subject matter) regarding Mr. McGoff.[4]

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[2]The SEC based its suspicion that Mr. McGoff, in Schedule 13D filings, had misrepresented facts with respect to his purchases of Panax stock on a May, 1979 report of a government-appointed commission in the Republic of South Africa, popularly known as the "Erasmus Report." In one chapter of the report, dealing with a broad spectrum of allegations, it charged that the South African Department of Information had provided $10,000,000 to Mr. McGoff for the purchase of the *Washington Star*, and ultimately used for the acquisition of the *Sacramento Union*. App. 4a-5a. Panax is nowhere mentioned in the report.

[3]Not until one year *after* the subpoenas to Mr. McGoff, Global and Sacramento — all private entities — did the SEC serve any subpoena on Panax Corporation.

[4]In March, 1981, the SEC also joined the pattern established by the Justice Department by leaking to the press the status and substance of its investigation. That pattern also continues to this date. App. 44a-47a.

In early July, 1979, the Federal Communications Commission revoked preliminary approval of a license for Panax to acquire a television station in Traverse City, Michigan because of the pending Department of Justice investigation.

As described by the court of appeals, Mr. McGoff is an "[a]ctive and vocal conservative" who was a "[f]ierce critic of the [Carter] Administration." App. 3a.[5] He actively engaged in the writing of political and news commentary. In particular, Mr. McGoff was a vocal critic of the Carter Administration's foreign policy with regard to the Republic of South Africa. *Id.* Given his background as an Administration critic, and the thrust of that criticism relating to United States policy on South Africa, the simultaneity of the tripartite investigation by that Administration, and its heavy emphasis on Mr. McGoff's contacts with South African leaders, raised serious questions in the mind of Mr. McGoff's counsel as to the propriety and *bona fides* of the SEC's investigation. As a result, Petitioners filed limited initial discovery requests – according to the procedure of the District of Columbia Circuit, *United States v. Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977) – probing whether the SEC investigation was part of a coordinated government effort to harass Mr. McGoff. *See* App. 38a-43a.

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[5]The *Wall Street Journal* on June 6, 1979 characterized Mr. McGoff as "an arch-conservative . . . frequently in the center of controversy," noting that he "revels in expounding his political views through the editorial pages of the papers he controls – sometimes even over the objections of his own editors . . . . His personal affairs reflect his conservative views and frequently embroil him in public disputes" and "he had long been an outspoken defender of U.S. corporate involvement in South Africa."

The district court, without stating any reasons, quashed Petitioner's discovery requests and enforced the subpoenas, with one exception,[6] on the basis that the demands therein "are reasonably related to the lawfully authorized powers of the Commission." The court of appeals affirmed both of the district court orders.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS AFFIRMING THE DISTRICT COURT'S DENIAL OF DISCOVERY IS DIRECTLY IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

A. There is a conflict among the circuits regarding the threshold level of proof which must be demonstrated by a party resisting enforcement of an administrative subpoena in order to obtain discovery against the agency.

This Court has long held that a subpoena issued by an administrative agency in bad faith or for an improper purpose will not be enforced. *See, e.g., United States v. LaSalle National Bank,* 437 U.S. 298 (1978); *United States v. Bisceglia,* 420 U.S. 141 (1975); *Donaldson v. United States,* 400 U.S. 517 (1971); *United States v. Powell,* 379 U.S. 48 (1964).[7]. It is undisputed that the burden is on the

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[6]The district court excepted from the subpoenas' scope "any document which solely relates to editorial policy or solely relates to information obtained as part of the process of gathering news for possible publication." App. 18a.

[7]The most extensive precedent in this field relates to IRS summons. The same basic principles, however, are applicable to all administrative subpoenas. *See SEC v. Wheeling-Pittsburgh Steel Corp.,* No. 80-1375, slip op. at 12-13 (3d Cir. Jan. 21, 1981) (en banc); *Lynn v. Biderman,* 536 F.2d 820, 825-26 (9th Cir.), *cert. denied,* 429 U.S. 920 (1976); *FTC v. MacArthur,* 532 F.2d 1135 (7th Cir. 1976); *Shasta Minerals & Chemical Co. v. SEC,* 328 F.2d 285 (10th Cir. 1964).

party challenging the subpoena to demonstrate bad faith or improper purpose. *See, e.g., United States v. Powell,* 379 U.S. 48, 58 (1964). This allocation of the burden of proof, however, leaves open an important question: under what circumstances is a party challenging a subpoena on these grounds entitled to some form of discovery in order to enable him to substantiate his allegations and satisfy his burden of proof?[8] Two distinct lines of precedent have evolved: "[o]ne allows liberal discovery and one sharply curtails it." *United States v. Ryan,* 485 F.Supp. 1285, 1290 (S.D.N.Y. 1980).

The District of Columbia Circuit has consistently held that "extraordinary circumstances" are necessary to abrogate the general rule that discovery is inappropriate in subpoena enforcement proceedings. *See, e.g., United States v. Exxon,* 628 F.2d 70, 77 n.7 (D.C. Cir.), *cert. denied,* 446 U.S. 964 (1980); *United States v. Fensterwald,*

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[8]Unless otherwise indicated, the term "discovery" is used throughout this petition in its broadest sense: any procedure designed to elicit evidence to confirm or refute allegations of bad faith or improper purpose. Discovery procedures that have been judicially authorized include interrogatories to the agency, *United States v. Fensterwald,* 553 F.2d 231 (D.C. Cir. 1977); depositions of agency personnel, *United States v. Wright Motor Co.,* 536 F.2d 1090 (5th Cir. 1976); *United States v. Nelsen Steel & Wire Co.,* 485 F.Supp. 949 (N.D. Ill. 1980); and an evidentiary hearing at which the party challenging the subpoena is permitted to take the testimony of agency personnel, *United States v. Harris,* 628 F.2d 875 (5th Cir. 1980); *United States v. Church of Scientology,* 520 F.2d 818 (9th Cir. 1975); *United States v. Salter,* 432 F.2d 697 (1st Cir. 1970). It is widely recognized, however, that these procedures are, in this context, roughly equivalent, insofar as they all enable the party challenging the subpoena to obtain the supporting facts he needs to satisfy his burden of proof. *See, e.g., United States v. Harris,* 628 F.2d at 881; *United States v. Wright Motor Co.,* 536 F.2d at 1095; *United States v. Salter,* 432 F.2d at 701 n.7.

553 F.2d 231 (D.C. Cir. 1977). The court of appeals in this case applied that standard to affirm the district court's denial of discovery. App. 14a-16a.

The court's requirement of a showing of extraordinary circumstances as a prerequisite to discovery is in direct conflict with the holdings of at least four other circuits. The Third Circuit has recently held that discovery is appropriate whenever there is a "non-frivolous" allegation of impropriety. *SEC v. Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc); *see also United States v. Garden State National Bank*, 607 F.2d 61 (3d Cir. 1979); *cf. United States v. Ryan*, 485 F. Supp. 1285, 1290 (S.D.N.Y. 1980) (Third Circuit allows "routine" discovery).[9] The First, Fifth and Ninth Circuits also allow routine discovery on the basis of mere allegations of improper purpose. *See United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975); *United States v. Salter*, 432 F.2d 697, 700 (1st Cir. 1970); *United States v. Roundtree*, 420 F.2d 845 (5th Cir. 1969). The First Circuit has recently clarified its holding in *Salter*, suggesting that the party resisting enforcement need only "allege the unenforceability of the summons due to [agency] bad faith and indicate his interest in offering proof." *United States v. Freedom Church*, 613 F.2d 316, 323 (1st

[9]The Third Circuit explicitly permits a party challenging an administrative subpoena to obtain discovery very similar to the interrogatories propounded by Mr. McGoff: a party is entitled to know, *inter alia*, "the nature of any contacts, relating to or during the investigation, between the investigative agents and officials of the Department of Justice." *United States v. Garden State National Bank*, 607 F.2d 61, 71 (3d Cir. 1979); *United States v. Genser*, 595 F.2d 146, 152 (3d Cir.), *cert. denied*, 444 U.S. 928 (1979).

Cir. 1979); *see also SEC v. Howatt,* 525 F.2d 226, 229 (1st Cir. 1975) (discovery precluded where "no meaningful evidence" of improper motive offered).

Two circuits, on the other hand, have adopted a standard approaching that of the District of Columbia Circuit, holding that a party resisting enforcement must make a "substantial preliminary showing" of bad faith in order to obtain discovery. *United States v. Moon,* 616 F.2d 1043, 1047 (8th Cir. 1980); *United States v. Morgan Guaranty Trust Co.,* 572 F.2d 36, 42-43 n.9 (2d Cir.), *cert denied,,* 439 U.S. 822 (1978).

The decision of the court of appeals in this case thus directly implicates Rule 17.1(a) of the Rules of this Court, which suggests that review on writ of certiorari may be appropriate when "a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter."

The question of the threshhold level at which discovery may be obtained is, moreover, "an important question of federal law which has not been, but should be, settled by this Court," Rule 17.1(c) of the Rules of this Court. The risk of the use of selective prosecution or investigation as a government weapon against government critics is a well-recognized danger. *See, e.g., United States v. Bisceglia,* 420 U.S. 141, 146 (1975); *United States v. Powell,* 379 U.S. 48, 58 (1964); *United States v. Berrios,* 501 F.2d 1207, 1209 (2d Cir. 1974). The limitations placed on agencies by the prophylactic rule of *United States v. Powell,* however, lose much of their potency if the party seeking to resist enforcement of an agency subpoena on grounds of bad faith is "placed in the unfair dilemma of having to provide supporting facts, but having no way way to obtain those facts." *United States v. Harris,* 628 F.2d 875, 880 n.6 (5th Cir. 1980); *see also United States v. Moriarty,* 278

F.Supp. 187, 188 (E.D.Wis. 1967) (discovery "may be of special importance" in these circumstances). At the same time, of course, "discovery must be circumscribed if the enforcement process is to keep its summary character." *United States v. Nelsen Steel & Wire Co.*, 485 F.Supp. 949, 953 (N.D.Ill. 1980); *see also United States v. Church of Scientology*, 520 F.2d 818, 824 (9th Cir. 1975) (need to "avoid dilatory and burdensome discovery procedures"). This Court should grant a writ of certiorari in order to articulate the appropriate balance to be struck between these two important competing interests.

B. There is a conflict among the circuits regarding the grounds which, if proven, might justify a district court refusal to enforce an administrative subpoena.

Even if the court of appeals was correct in holding that a party challenging an administrative subpoena must demonstrate "extraordinary circumstances" in order to be entitled even to minimal discovery, there is another source of error in the court's decision to affirm the district court's denial of discovery. The court cited Mr. McGoff's failure to allege any "prior involvement with" the SEC, which "might have stimulated that agency to retaliate against him," as a significant reason for its finding that no extraordinary circumstances existed. App. 15a. Evidence of such prior involvement is pivotal only if the party challenging the subpoena is required to demonstrate agency bad faith amounting to actual malicious intent.

The Third Circuit, however, has recently held that proof of actual agency malice or intent is not a prerequisite to a refusal to enforce an administrative subpoena under *United States v. Powell* and its progeny. In *SEC v. Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir.

Jan. 21, 1981) (en banc), the court held that denial of enforcement is appropriate not only in cases of agency bad faith or improper purpose, but also where the agency, at the behest of an influential third party, allows its investigative process to be used without an independent and impartial agency determination that an investigation is warranted. The court reasoned that such circumstances might constitute an abuse of agency process such that enforcement of the subpoena would amount to abuse of judicial process. The circumstances on which Mr. McGoff bases his request for discovery[10] suggest a coordinated

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[10]These circumstances, presented to the lower courts, include:

(1) John McGoff has a clear, nationwide record of vocal, often acerbic, criticism of the Carter Administration, its foreign policy and its highest officials.

(2) Three Federal agencies and a congressional subcommittee began their investigations almost simultaneously. The Department of Justice began its investigation in May 1979 and convened a grand jury investigation in August 1979; the SEC made its first inquiry to respondent's counsel one month later, and it can be assumed that its informal investigation had begun sometime before that, *i.e.*, in May or June 1979; the FCC reversed a decision to grant a license to one of Mr. McGoff's operations, pending further investigation into the South African allegations, in early July 1979; and counsel received inquiries from at least one congressional subcommittee in May 1979 regarding a possible investigation into the South African allegations. A strong inference arises that these investigations were generated by an outside individual or individuals simultaneously contacting these agencies to undertake investigations for political purposes.

(3) The SEC, in an affidavit filed with its motion for a protective order, disclosed that it has been in contact with the Department of Justice, and has agreed to provide information that it receives in the course of its investigation to the Department, thus raising the spectre of a coordinated civil/criminal attack on Mr. McGoff, with potential abuse of the SEC's civil enforcement powers.

governmental effort, instigated or directed by powerful individuals in the Administration, to harass Mr. McGoff. Such an effort, if proven, would justify denial of enforcement under the *Wheeling-Pittsburgh Steel* analysis.[11] The court of appeals' implicit failure in this case even to consider whether the allegations created an inference of an outside influence in the agency's determination sufficient to trigger discovery is thus directly in conflict with the decision of the Third Circuit. The District of Columbia Circuit has apparently aligned itself instead with the *Wheeling-Pittsburgh Steel* dissenters, who argued that "Supreme Court decisions on enforcement of agency subpoenas leave no room for an 'abuse of the judicial process' theory independent of the bad faith defense." *SEC v. Wheeling-Pittsburgh Steel Corp.*, slip op. at 29. This conflict warrants a grant of a writ of certiorari by this Court under Rule 17.1(a), independent of the question whether extraordinary circumstances must be shown to obtain discovery.

II. THE DECISION OF THE COURT OF APPEALS AFFIRMING ENFORCEMENT OF THE SUBPOENAS IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER FEDERAL COURTS OF APPEALS

The SEC has consistently argued in these proceedings that the subpoenas are to be tested under the traditional

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[11] The court of appeals in this case apparently relied heavily on the SEC's contention that its investigation was triggered by the Erasmus Report, and that that Report constitutes a legitimate basis for its investigation, precluding any finding of bad faith. The Third Circuit recognized, however, that while the merits of the alleged violations underlying an investigation may constitute evidence of the agency's good faith, such evidence is not conclusive. *SEC v. Wheeling-Pittsburgh Steel*, No. 80-1375, slip op. at 18-19 (3d Cir. Jan. 21, 1981) (en banc).

standard for enforcement of administrative subpoenas: the sole determination is whether "the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186, 209 (1946). We contend that the subpoenas must be judged instead by the strict scrutiny imposed on govenmental actions that impinge on First Amendment freedoms: the government must show both that there exists a substantial relation between the information sought and an overriding or compelling state interest, *and* that no less drastic means exist to achieve the govenmental end. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 64-65 (1976); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 546 (1963); *Bates v. Little Rock,* 361 U.S. 516, 524 (1960); *NAACP v. Alabama,* 357 U.S. 449, 460 (1958).

The district court accepted the SEC's general argument, for it held, without discussion, that "the Commission's subpoena demands do not contravene the First or Fourth Amendments to the Constitution" except insofar as they pertained to documents relating "solely . . . to editorial policy or solely . . . to information obtained as part of the process of gathering news for possible publication," and "are reasonably related to the lawfully authorized powers of the Commission." App. 18a.[12] The court of appeals af-

[12]While we continue to maintain that this so-called "exception" is meaningless, because it does not exempt documents which reflect both editorial and non-editorial decisionmaking, the thrust of our argument is that the First Amendment protects more than mere editorial or newsgathering decisions. While the district court's protective order may afford some protection to editorial and newsgathering decisions, it neglects the equally important interest in anonymity of publication and free political association. *See* p. 18a, *infra.* The standard under which the subpoenas were reviewed by both courts is insufficiently protective of these First Amendment interests.

firmed this holding. App. 8a-14a. We contend that this ruling was erroneous in that it did not require the SEC to prove that the subpoenas bore a substantial relationship to a compelling or overriding governmental interest, or that the subpoenas constituted the most narrow means of satisfying that interest.[13]

We do not contend that Mr. McGoff is immune from SEC jurisdiction or regulations, simply because he engages in activities protected by the First Amendment. *See Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *NAACP v. Alabama,* 357 U.S. 449, 463 (1958); *Associated Press v. NLRB,* 301 U.S. 103 (1937). Nor do we contend that no

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[13]In its opinion, the court of appeals asserted that, even accepting our position that a stricter standard of review is required, the SEC has shown a substantial relationship between the information sought and an important government interest. App. 12a. Were this assertion to be supported by a detailed, careful review of the subpoena requests in light of the informational needs of the SEC, our argument here would be less compelling. But the court's review was far less than the careful, detailed review required, apparently on the premise that (App. 13a):

> We agree that the demands are broad. But the nature of the inquiry precludes a trim list of requests.

Such treatment of subpoena demands directly impacting on First Amendment interests flies in the face of this and other courts' cautionary statements. *See* pp. 16-18, *infra.*

Moreover, the second basis for the court's superficial analysis of the document demands — that the SEC inquiry is not that of an abusive governmental agency bent on "exposing for the sake of disclosure" — can hardly be sufficient to justify the court's analysis when Petitioners alleged that the SEC inquiry may have been brought for an improper purpose (political harassment), and the court of appeals denied Petitioners any discovery with regard thereto.

Finally, contrary to the court's third basis for its relaxed analysis, there can be no question but that the subpoenas constitute "a broad-scale . . . executive foray into political activity and associations implicating direct sanctions against the exercise of First Amendment liberties." App. 14a.

SEC investigation could ever reach the subject matter of this subpoena. What we do contend is that, in the words of this Court:

> [T]he . . . power to investigate, broad as it may be, is not without limit. The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or demand all forms of information. Validation of the broad subject matter under investigation does not necessarily carry with it automatic and wholesale validation of all individual questions, subpoenas, and documentary demands. When, as in this case, the claim is made that particular inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals, the courts are called upon to, and must, determine the permissibility of the challenged actions.

Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 545 (1963) (citations omitted). This is merely a reflection of the general principle that even a legitimate and substantial governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960); *accord, Louisiana v. NAACP,* 366 U.S. 293, 296 (1961).

The limits on investigatory powers of law enforcement entities, and the consequent application of the strict scrutiny test established by *NAACP v. Alabama* and its progeny, have led courts to invalidate a legislative subpoena, *Gibson v. Florida Legislative Investigation Committee, supra,* an IRS summons, *United States v. Citizens State Bank,* 612 F.2d 1091 (8th Cir. 1980), and a grand

jury subpoena, *Bursey v. United States,* 466 F.2d 1059 (9th Cir. 1972).[14] The failure of the courts below to require application of this strict test to administrative subpoenas thus conflicts with the decisions of this Court in *Gibson* and of two other federal courts of appeals in *Citizens State Bank* and *Bursey.*[15]

The conflict between the court's holding in this case and the decision in *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980), is particularly apparent. The court in that case invalidated an IRS summons demanding information that would allegedly "identify the members of and contributors to" a controversial political association. 612 F.2d at 1093. The court held that the IRS was required to narrow its demands in order to obtain only the information for which it had a "cogent and compelling" need. *Id.* at 1094. The *Citizens State Bank* court held, in stark contrast to the court's holding in the instant case, that "if appellants' First Amendment rights would be infringed by forcing the bank to divulge certain documents, compelled

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[14]We have been unable to locate any cases on this question in the context of SEC subpoenas. However, courts have consistently recognized the similarities among these various law enforcement agencies and their investigative powers. *See, e.g., SEC v. Wheeling-Pittsburgh Steel Corp.,* No. 80-1375, slip op. at 12-13 (3d Cir. Jan. 21, 1981) (en banc); *SEC v. Arthur Young & Co.,* 584 F.2d 1018, 1030 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 1071 (1979); *Lynn v. Biderman,* 536 F.2d 820, 825-26 (9th Cir.), *cert. denied,* 429 U.S. 920 (1976); *Pollard v. Roberts,* 283 F.Supp. 248, 255 (E.D. Ark.), *aff'd,* 393 U.S. 14 (1968).

[15]Two other federal courts of appeals have suggested or implied that the test might be applicable where, as here, the party challenging the subpoena could demonstrate a chilling effect on protected activities. *United States v. Freedom Church,* 613 F.2d 316, 320 (1st Cir. 1979); *SEC v. Wall Street Transcript Corp.,* 422 F.2d 1371 (2d Cir. 1970).

disclosure is permissible only if the government makes the requisite showing of compelling need." *Id.* at 1094-95.

Moreover, the court of appeals in this case approved a wholesale probe into Mr. McGoff's political associations, without any meaningful examination of the individual demands of the subpoenas, on the ground that "[t]he nature of the inquiry precludes a trim list of requests." App. 13a. By contrast, the court in *Bursey v. United States*, 466 F.2d at 1086, required the government to carry its burden "almost question by question. . . ." As that court noted, "[w]hen First Amendment interests are at stake, the Government must use a scalpel, not an ax." *Id.* at 1088.

Strict scrutiny is particularly appropriate here because the subpoenas at issue directly affect Mr. McGoff's unpopular political associations and controversial speech. This Court has repeatedly held that the right of anonymity is a necessary concomitant of the freedom of association guaranteed by the First Amendment. *See, e.g., Hynes v. Mayor of Oradell,* 425 U.S. 610 (1976); *Buckley v. Valeo,* 424 U.S. 1 (1976); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963); *Louisiana v. NAACP,* 366 U.S. 293 (1961); *Talley v. California*, 362 U.S. 60 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958). Moreover, this Court has recently held that compelled disclosure of even "the giving and spending of money" implicates the First Amendment's protection of association, and thus requires searching review. *Buckley v. Valeo,* 424 U.S. at 66; *accord, United States v. Citizens State Bank,* 612 F.2d 1091 (8th Cir. 1980).[16]

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[16]Both the SEC and the courts below relied heavily on *Branzburg v. Hayes,* 408 U.S. 665 (1972), in support of the argument that Mr. McGoff's First Amendment activities entitle him to no special con-

This Court should therefore grant a writ of certiorari because, had the courts below applied the correct standard of review to the subpoenas at issue, they might well have concluded that the subpoenas cannot survive the required scrutiny. The only information on which the SEC bases its investigation, the Erasmus Report, relates to the internal relationships and transactions among Mr. McGoff and his privately-held companies. The asserted nexus between these entities and the SEC is their relationship to Panax. In other words, the sole *informational* basis for the SEC's inquiry is the Erasmus Report. The sole *jurisdictional* basis is the relationship of Global, Sacramento and Mr. McGoff to Panax. The two never meet, factually or otherwise, to provide support for the SEC's broadscale subpoenas. These vague bases for the subpoenas simply do not survive the exacting scrutiny applied in the context of the First Amendment. *See Hynes v. Mayor of Oradell,* 425 U.S. 610, 620 (1976) ("The general test of vagueness applies with particular force in review of laws dealing with speech"). Moreover, the subpoenas are extremely broad, calling for virtually every document relating to numerous transactions and dealings over a nine-year period, and are not limited to documents which might substantiate the Erasmus Report allegations or even to documents which have any nexus with Panax. *See NAACP v. Button,* 371

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sideration. *Branzburg* is inapposite here for two reasons. First, *Branzburg* dealt only with the protection afforded press and publishing activites; neither *Branzburg* nor any subsequent case has suggested that infringment of *associational* rights should be treated in the cavalier fashion adopted by the courts below. Second, at least two courts have interpreted *Branzburg* as rejecting only an absolute privilege for press entities. *Zerilli v. Smith,* No. 79-2466 (D.C. Cir. April 13, 1981); *Riley v. City of Chester,* 612 F.2d 708, 714 (3d Cir. 1979). We contend here only that Petitioners are entitled to a searching review of the offending subpoenas, not that they are immune from investigation. *Branzburg,* therefore, does not dispose of the issue.

U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). Finally, the Erasmus Report itself, and the investigation on which it is based, are similar to the testimony that this Court found to be insufficient foundation for a legislative subpoena in *Gibson v. Florida Legislative Investigation Committee:* "merely indirect, less than unequivocal, and mostly hearsay," 372 U.S. at 555.

The courts below applied an incorrect standard of review to these subpoenas, and consequently reached a decision in conflict with both the decisions of this Court and the decisions of at least two other federal courts of appeals. This error warrants granting a writ of certiorari under the considerations articulated by Rules 17.1(a) and 17.1(c) of the Rules of this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the District of Columbia Circuit reversed.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-2484

SECURITIES AND EXCHANGE COMMISSION

v.

JOHN P. MCGOFF,
GLOBAL COMMUNICATIONS CORP.,
SACRAMENTO PUBLISHING CO.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Misc. No. 79-0208)

Argued November 17, 1980

Decided February 3, 1981

Judgment entered this date

Raymond G. Larroca, with whom *Herbert J. Miller, Jr.* and *James E. Rocap, III* were on the brief, for appellants.

Paul Gonson, Solicitor, SEC, with whom *Jacob H. Stillman*, Associate General Counsel and *Rosalind C. Cohen*, Assistant General Counsel, SEC were on the brief, for appellee.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JOYCE HENS GREEN*, U.S. *District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: During the summer of 1979 the Securities and Exchange Commission instituted a formal, non-public investigation centering on John P. McGoff, a controversial newspaper publisher, columnist, and lecturer. Subpoenas duces tecum were served on McGoff and two companies wholly owned by him. The purpose of the investigation was to determine whether McGoff or corporations he served as helmsman violated anti-fraud, reporting, beneficial ownership, and proxy provisions of the Federal securities laws. Securities Exchange Act §§ 10(b), 13(a), 13(d), and 14(a), 15 U.S.C. §§ 78j(b), 78m(a), 78m(d), 78n(a) (1976 & Supp. III 1979). When McGoff and his companies refused to comply with the subpoenas the SEC initiated this enforcement proceeding.

In response to McGoff's objection that the subpoenas were unduly burdensome in that they sought records of fourteen separate entities, the SEC narrowed its demand to exclude references to "any affiliates, parents or subsidiaries" of companies named in the subpoenas. In response to McGoff's concerns that the information sought could include documentation regarding editorial decisions or the sources for or writing of news stories, District Judge Gerhard A. Gesell excluded from the reach of the subpoenas "any document which solely relates to editorial policy or solely relates to information obtained as part of the process of gathering news for possible publication." Joint Appendix (J.A.) at 220.

The SEC demands were made pursuant to marketplace regulatory laws of general applicability. Beyond question,

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*Sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

those laws serve a substantial public interest. They are not aimed at the press as distinguished from other commercial ventures. They do not directly regulate the content, time, place, or manner of expression, nor do they directly regulate political associations. We conclude that, in the order requiring compliance with the SEC's subpoenas, the district court appropriately accommodated McGoff's interests as a publisher. We further conclude that, on the facts before us, McGoff and his wholly owned companies were not entitled to launch an inquiry, through discovery, into the SEC's motives for instituting this investigation. We therefore affirm.

I. *Background*

John McGoff is an "[a]ctive and vocal conservative" and has been a "[f]ierce critic of [Carter] administration" attitudes and policies. Brief for Appellants at 7. In particular, he has criticized insistently United States policy regarding South Africa. While McGoff believes that South Africa's racial policies are a "tragic mistake," he opposes attempts to limit United States investment in that country.

McGoff is the self-made helmsman of an extensive newspaper publishing and printing network. He is the founder, president, and sole owner of Global Communications Corp. (formerly named Star Newspaper Co.), one of the companies that resists enforcement of an SEC subpoena in this case. Global, in turn, wholly owns Sacramento Publishing Co., the second company challenging an SEC subpoena before this court. Sacramento and Global are apparently predominantly holding companies.

Of pivotal concern to the SEC, McGoff is the founder, president, a director, and a shareholder of Panax Corp., a publicly registered corporation whose common stock is traded over the counter. Panax owned and operated sixty-five daily and weekly newspapers in seven states at the time the SEC began its investigation in 1979. As of

December 31, 1978, Global owned approximately 23% of Panax's outstanding common stock, Sacramento owned about 17% of the stock, and McGoff held directly about 1%. McGoff, therefore, had a beneficial interest in about 40% of Panax's stock.

Under section 13(d) of the Securities Exchange Act, 15 U.S.C. § 78m(d) (1976 & Supp. III 1979), beneficial owners of more than 5% of the shares of a publicly held corporation must disclose, *inter alia*, the number of shares owned, the source of funds used to purchase the shares, and any arrangements or understandings relating to the shares. McGoff, Global, and Sacramento have filed several § 13(d) statements relating to their Panax holdings. In the spring of 1979, however, the SEC became suspicious that they had not disclosed all of the required information.

One source of the SEC's suspicion was the *Erasmus Commission Report*, a report completed in December 1978 by a judicial commission that the government of South Africa appointed to inquire into alleged irregularities in that nation's former Department of Information. The *Erasmus Report* stated that McGoff had received more than $11.3 million from the South African government to attempt to purchase the *Washington Star* (one of the two major dailies published in the District of Columbia) and a controlling interest in the United Press International and Television Network (a London-based television news service). According to the *Erasmus Report*, the government of South Africa agreed to finance these purchases because it wanted McGoff to secure an influential media position from which he could stimulate favorable attitudes towards South Africa.

McGoff purchased an interest in the London news service for about $1.3 million. However, his negotiations for the purchase of the *Washington Star* were unsuccessful. Instead, again according to the *Erasmus Report*, McGoff used $6 million of the funds supplied by South Africa to purchase a newspaper in the capital of California, the

Sacramento Union. The remaining $4 million, McGoff told South African officials, were used to operate the *Union*.

The SEC, however, entertained a different theory about McGoff's disposition of the South African funds. Shortly after McGoff received $10 million from South Africa for the anticipated purchase of the *Washington Star*, McGoff, Global (then Star Newspaper), and Sacramento began to acquire large quantities of Panax stock.[1] The SEC suspected that South African government money was used for the "massive acquisitions" of Panax stock and that McGoff, Global, and Sacramento had failed to identify this source of funds in their § 13(d) statements. The SEC further suspected that McGoff might have made an undisclosed agreement with South African officials to use Panax newspapers to promote South African interests.

The *Erasmus Report* also aroused SEC suspicions about another possible violation of disclosure requirements. The report revealed that South Africa had asked McGoff to return the $11.3 million advanced to him. In 1978, after McGoff had agreed to repay at least some of the money, he obtained $1 million in cash from Panax in exchange for eleven Texas newspapers (the "Suburbia" newspapers) then owned by McGoff, Global, and Sacramento. The SEC suspected that appropriate disclosures respecting this transaction might not have been made and that the transaction might have been unfairly structured to benefit McGoff.

The SEC commenced a private investigation and served the subpoenas duces tecum that prompted this litigation.

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[1] Although McGoff had founded Panax, the report he filed with the SEC at the end of November 1973 indicated that he then owned, directly or indirectly, only 43,126 shares. J.A. 176. Five years later, his report showed ownership of nearly 460,000 Panax shares. J.A. 174. No report McGoff or his companies filed with the SEC mentions South African funds or any other ties to the government of South Africa.

The subpeonas requested McGoff, Global, and Sacramento to produce "any and all documents concerning or involving . . . directly or indirectly" the following categories of information:

> (1) any transactions, contacts, or dealings with the South African government or its political subdivisions; South African officials, political candidates, or political parties; and seven named South African political figures,
>
> (2) any receipts or disbursements of South African funds,
>
> (3) any transactions or proposed transactions involving the securities of Panax, Global, Sacramento, Star Newspaper Co. (the predecessor of Global), or the Suburbia newspapers,
>
> (4) any transactions with the Union Bank of Switzerland or Thesaurus Continental Securities Corp. (the Swiss entities that allegedly funneled the South African funds to McGoff),
>
> (5) the incorporation and capitalization of Global and its predecessor Star,
>
> (6) any contacts or dealings concerning the proposed acquisition of the *Washington Star*, and
>
> (7) any contacts or dealings concerning the acquisition or disposition of the *Sacramento Union* or Suburbia newspapers.

In addition, the SEC demanded the financial records of Global, Star, and Sacramento. The time frame for all requests ran from January 1, 1971, to the date of the demand.[2]

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[2]The *Erasmus Report* describes relations between McGoff and South African officials commencing in 1968 and a relationship between McGoff and the former Minister of Information dating back to 1971. J.A. 152-53, 155.

McGoff, Global, and Sacramento refused to comply with the SEC subpoenas, asserting that they were overbroad and offensive to First Amendment interests. The SEC thereupon initiated this enforcement proceeding. Shortly after institution of the proceeding, McGoff, Global, and Sacramento sought to determine, through interrogatories and a document production request, whether the SEC investigation was part of a coordinated government effort to harass McGoff. The SEC moved for a protective order prohibiting discovery.

After a hearing Judge Gesell entered orders disallowing discovery and directing McGoff, Global, and Sacramento to comply with the subpoenas. Judge Gesell modified the SEC's demands, however, by permitting McGoff and his companies to withhold documentation relating solely to "editorial policy" or "information obtained as part of the process of gathering news for possible publication."

McGoff, Global, and Sacramento appealed. On February 11, 1980, this court denied an application to stay the district court's order. A month later Chief Justice Burger, following reference of the matter to the entire Court, also refused to grant a stay.[3] On March 18, 1980, appellants began delivering documents to the SEC. We were advised at oral argument that document production has been "substantially completed."[4]

On appeal McGoff, Global, and Sacramento challenge both the enforcement of the SEC's subpoenas and the de-

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[3] Both this court and the Supreme Court had previously granted temporary stays to enable the courts to study the matter before acting.

[4] Delivery of the documents does not moot this appeal. It is clear in this circuit that even after subpoenaed documents have been fully disclosed, the subpoenaed party may pursue a claim for relief, including return of the documents. FTC v. Browning, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970).

nial of their discovery requests. We address each of these claims in turn.

II. *Enforcement of the SEC Subpoenas*

McGoff and his companies, Global and Sacramento, have voluntarily associated themselves with Panax, a publicly held corporation, and are unquestionably subject to disclosure obligations the Federal securities laws impose on persons holding significant interests in such a corporation. They enjoy no special privilege as "press entities" to withhold information others must furnish to the investing public.

The SEC, invoking regulatory laws of general applicability, seeks to pursue a vigorous investigation involving McGoff's publishing and printing network. McGoff resists the investigation on the basis of his status as a publisher. We do not doubt his claims that the demands confronting him may affect his ability to gather and circulate information and argument or that they inquire into his associations with South African officials. But the Federal securities laws that the SEC invokes are nondiscriminatory, they impose no direct regulation on the content, time, place, or manner of expression, nor do they directly regulate McGoff's associations. *See generally* Cox, *Foreword: Freedom of Expression in the Burger Court*, 94 Harv. L. Rev. 1, 50–55 (1980).

The Supreme Court has consistently rejected claims that the press is shielded by the Constitution against laws of general applicability of the kind involved here. *See Associated Press v. NLRB*, 301 U.S. 103, 130–33 (1937) (application of National Labor Relations Act to employment of reporters and editors); *Associated Press v. United States*, 326 U.S. 1 (1945) (application of Sherman Act to news gathering and disseminating organization); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 192–94 (1946) (requiring newspapers to comply with

minimum wage and overtime restrictions applicable to other enterprises producing goods for interstate commerce). More recently, the Court has ordered journalists to comply with legal obligations of general applicability in the face of assertions no less appealing than the ones made by McGoff. *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporters asked relevant questions in a grand jury probe are not privileged to conceal their sources and information conveyed to them under promise of confidentiality); *Herbert v. Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (no special immunity for the press from search warrants).

We do not understand McGoff, Global, and Sacramento to challenge their legal obligation to comply with SEC disclosure rules. Indeed, they have regularly filed § 13(d) statements without objection. Rather, they assert that the SEC has reached too far, that it should have limited its inquiries to contacts with South Africa relating specifically to Panax stock acquisitions. Reply Brief for Appellants at 4–5.

The SEC, on the other hand, points out that the *Erasmus Report* describes a covert operation; it indicates but does not spell out financing and other agreements with McGoff. J.A. 203–04. To determine what the public has a right to know regarding Panax's financial and control arrangements, the SEC claims it must uncoil the skein of dealings in which McGoff was involved during the periods in which he may have negotiated the fund transfer with South African officials, when he so substantially augmented his Panax holdings, and when he transferred the Suburbia newspapers to Panax for $1 million in cash.

We have no doubt that the information the SEC demands in this case bears a sufficient relationship to possible violations of disclosure rules to fit comfortably within the general standard for enforcement of administrative subpoenas. *See FTC v. Carter*, No. 79-1331, slip op. at

12-13 (D.C. Cir. Nov. 28, 1980); *SEC v. Arthur Young & Co.*, 584 F.2d 1018, 1028-31 (D.C. Cir. 1978) (information may be obtained if reasonably relevant to an inquiry within the authority of the agency), *cert. denied*, 439 U.S. 1071 (1979). There are suggestions in recent opinions, however, that while press figures enjoy no special privilege exempting them from laws of general applicability, some balancing or special sensitivity is required in view of the vital function the press serves in a self-governing society. *See Branzburg v. Hayes*, *supra*, 408 U.S. at 709-10 (Powell, J., concurring); *Zurcher v. Stanford Daily*, *supra*, 436 U.S. at 564 (where First Amendment interests are at stake, Fourth Amendment requirements should be applied with "scrupulous exactitude").

The district court believed, and we agree, that an accommodation was required to avoid unnecessary encroachment upon McGoff's activities and associations as a newspaper publisher and writer. Judge Gesell therefore authorized McGoff to retain documentation relating solely to "editorial policy" or news gathering. Under controlling precedent, *see Branzburg v. Hayes*, *supra*, McGoff was not entitled to more.

McGoff characterizes the exception for news gathering and editorial material as "meaningless." Brief for Appellants at 1. Because the word "solely" is employed in the exception,[5] McGoff contends that memoranda "relating to editorial policy in part and to financial expectations in part, apparently would be disclosable in their entirety." Brief for Appellants at 40 n.14. We believe that the order, read together with Judge Gesell's statement from the bench,[6] could be understood to permit the withholding of any segregable portion of a document falling within the

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[5] *See* p. 2 *supra*.

[6] J.A. 218 ("[Y]ou are not required to disclose *documentation* which exclusively concerns the writing of a news story or the source of a news story.") (emphasis supplied).

excepted category. Moreover, we note that McGoff, who was to make the judgment in the first instance whether an item fell within the exception, might have sought clarification from the district court if he genuinely believed the order did "nothing to protect"[7] his editorial or news gathering activity.

Nor can we credit McGoff's arguments[8] that the subpoenas, in light of their impact on his publishing activity and political associations with prominent South Africans, should be rejected as more drastic than necessary, and as lacking an adequate foundation. In *Branzburg v. Hayes*, *supra*, 408 U.S. at 701–06, the Supreme Court turned aside similar claims by reporters who sought to shield their sources and information given to them in confidence from a grand jury probe. *Accord*, *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 570–71 (D.C. Cir. 1977).

McGoff does not argue, nor do we find, that *Branzburg* is inapplicable here because an agency rather than a grand jury issued the subpoenas. Moreover, in an important respect, McGoff's case is less compelling than that of the reporters in *Branzburg*. McGoff is not in any sense a disinterested third party called upon to supply evidence.[9] He is the principal actor in the matters the SEC seeks to investigate[10] and the corporate parties subpoenaed are wholly

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[7] Brief for Appellants at 40 n.14.

[8] Brief for Appellants at 36–37.

[9] *See also* Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (heightened review is appropriate where a government institution pursues persons and organizations not themselves suspected of complicity in any unlawful conduct).

[10] Judge Gesell's order safeguards to McGoff "any claim he may have under the Fifth Amendment." J.A. 220.

owned by him.[11]

Accepting McGoff's position that his publishing and political association concerns should attract sensitive review, however, we believe that the SEC has indicated more than a "reasonably relevant" link between the information it seeks and an authorized inquiry. It has shown "a substantial relationship" between the information sought and an important government interest.

The SEC pursues here no minor infraction of a technical rule. United States ties to South Africa are the subject of widespread public debate, as McGoff well understands. Investors and potential investors in Panax have a clear stake in knowing, and a congressionally mandated right to disclosure, if South African funds have been used to finance sizable Panax share acquisitions. Similarly, they have a right to know the facts if McGoff has pledged to use Panax newspapers to promote South African interests. Further, if McGoff unfairly structured Panax's purchase of the Suburbia newspapers, current or future stockholders of Panax may be the losers. It seems to us plain, therefore, that the SEC investigation serves an important government interest in assuring full disclosure to the investing public. The SEC suspicions, aroused by the *Erasmus* inquiry in South Africa, may not be borne out by the Commission's probe, but it is well within the agency's mission to investigate the matter.

Substantial links tie the government interest asserted to the information sought by the SEC. McGoff, Global, Sacramento, and Panax are closely intertwined. Tracing the covered path of South African funds may well require scrutiny of the financial records of Global and Sacramento and of Global's predecessor, Star. Documents concerning

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[11] The SEC's subpoena power does not extend across the seas to foreign individuals and entities named in relationship to McGoff in the *Erasmus Report*.

transactions with the foreign entities that channeled South African government funds to McGoff, Union Bank of Switzerland and Thesaurus Continental Securities Corp., bear an obvious relationship to the tracing the SEC wishes to undertake. Documents describing McGoff's contacts with South Africa and its officials may reveal whether McGoff agreed to use Panax newspapers to promote South African interests. Such an agreement, if it existed, is more likely to be implicit in a long course of dealings than explicit in a single precise writing. Documents concerning the attempted acquisition of the *Washington Star* and the substituted purchase of the *Sacramento Union* may shed light on the controversy indicated in the *Erasmus Report* over the reciprocal undertakings of McGoff and South African officials; they bear a clear relationship to the SEC's purpose both to trace the disposition of South African funds and to determine whether agreements with South Africa bear on operation of any Panax newspapers. Inquiry into the acquisition and disposition of the Suburbia newspapers, finally, is plainly tied to determining whether the transaction, in which McGoff may have had a personal interest, was unfair to other Panax shareholders.

McGoff and his companies emphasize the breadth of the SEC subpoenas. We agree that the demands are broad.[12] But the nature of the inquiry precludes a trim list of requests. It bears emphasis that the SEC's non-public investigation involves no abusive governmental agency bent on " 'expos[ing] for the sake of exposure,' " " 'prob[ing] at will and without relation to existing need,' " or "forcing wholesale disclosure of names and organizational affiliations" for a purpose not germane to the agency's mission. *Branzburg*, *supra*, 408 U.S. at 700 (citing with approval

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[12]*Cf.* Branzburg v. Hayes, *supra*, 408 U.S. at 673 (upholding grand jury summons directing reporter "to give such evidence as he knows relating to any matters which may be inquired of on behalf of the Commonwealth").

and distinguishing *Watkins v. United States*, 354 U.S. 178, 200 (1957); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960)). Nor is this SEC inquiry a broad-scale legislative or executive foray into political activity and associations implicating direct sanctions against the exercise of First Amendment liberties. *Cf. Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

In sum, we conclude that Judge Gesell's order enforcing the SEC's subpoenas as modified appropriately weighed the competing interests in light of controlling Supreme Court precedent and merits our full approbation.

III. *The Discovery Request*

McGoff and his wholly owned companies, Global and Sacramento, assert the possibility that the SEC's investigation "is politically motivated against a vocal critic of the [Carter] Administration." Brief for Appellants at 3, 42. To test "the *bona fides*"[13] of the investigation, McGoff and his companies served on the SEC a comprehensive set of interrogatories and a related request for documentary production. Judge Gesell disallowed any discovery. We conclude that Judge Gesell appropriately applied the general rule excluding discovery in summary subpoena enforcement proceedings absent "extraordinary circumstances." *See United States v. Exxon Corp.*, 628 F.2d 70, 77 n.7 (D.C. Cir.), *cert. denied*, 100 S. Ct. 2940 (1980).

McGoff asserts that "extraordinary circumstances" exist in this case, as they did in *United States v. Fensterwald*, 553 F.2d 231 (D.C. Cir. 1977). We find scant resemblance

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[13] Brief for Appellants at 3, 42.

between the two cases. Bernard W. Fensterwald, Jr., the subject of a special Internal Revenue Service audit, was permitted by this court to engage in "limited discovery" to determine how the IRS selected his name for the audit. Fensterwald had represented Watergate defendant James McCord at the time McCord made the "revelations to District Judge Sirica which contributed so greatly to . . . public knowledge of the Watergate conspiracy." 553 F.2d at 232. In addition, Fensterwald had served as chief counsel of a Senate committee that undertook investigation of alleged illegal activities of the Internal Revenue Service. That investigation resulted in "revelations . . . damaging to the reputation of the IRS." *Ibid.* Moreover, the IRS maintained that names for the special audit had been selected "entirely by chance as a result of computer selection." Establishing that fact, the court said, "should be easy for the IRS." 553 F.2d at 233.

McGoff, however stern his criticism of Carter administration policies, can point to nothing concrete paralleling the McCord Watergate revelations, disclosures which occasioned "great embarrassment" to persons highly placed in the Executive Branch. Nor has he alleged, as Fensterwald did, that his prior involvement with the agency conducting the investigation might have stimulated that agency to retaliate against him. Finally, the SEC here does not defend its investigation, as the IRS did in *Fensterwald*, as a chance selection. Rather, the SEC moored the probe in significant part to information revealed in an official, published report of the Republic of South Africa.

Most Americans criticize their government at one time or another and many in a position to be heard do so regularly and harshly. If strong criticism of administration policy on the part of the target of an agency investigation were sufficient to authorize inquiry into the agency's motives, little would remain of the general rule that "[e]xcept in extraordinary circumstances . . . discovery is improper

in a summary subpoena enforcement proceeding." *United States v. Exxon Corp.*, *supra*, 628 F.2d at 77 n.7. We hold that McGoff's diffuse speculations concerning possible misuse of administrative authority do not establish the "exceptional circumstances" necessary to take this case out of the general rule.

Conclusion

For all of the foregoing reasons, the orders of the district court are affirmed.

APPENDIX B

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

SECURITIES AND EXCHANGE COMMISSION, *Applicant,*	)	
v.	)	Misc. No. 79-0208
	)	Filed
JOHN P. McGOFF,	)	Dec. 12 1979
GLOBAL COMMUNICATIONS CORP.,	)	JAMES F. DAVEY, Clerk
SACRAMENTO PUBLISHING CO., *Respondents.*	)	

ORDER

Upon consideration of the Securities and Exchange Commission's motion for a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure that discovery not be had, and it appearing to the Court from the motion and other papers and documents filed in support thereof, particularly the affidavit of A. Barry Morewitz filed December 10, 1979, and response thereto, that good cause has been shown, it is hereby

ORDERED that the Securities and Exchange Commission's motion is hereby granted and that discovery by respondents not be had in this matter.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

December 12, 1979

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

SECURITIES AND EXCHANGE COMMISSION, *Applicant,*	)	
v.	)	Misc. No. 79-0208
	)	Filed
JOHN P. McGOFF,	)	Dec. 12 1979
GLOBAL COMMUNICATIONS CORP.,	)	JAMES F. DAVEY, Clerk
SACRAMENTO PUBLISHING CO., *Respondents.*	)	

ORDER

Upon consideration of the application of the Securities and Exchange Commission for an order pursuant to § 21(c) of the 1934 Securities Exchange Act, 15 U.S.C. § 78u(c), requiring obedience to three subpoenas duces tecum, the memoranda and affidavits submitted in support thereof and in opposition thereto, and it appearing that the Commission's subpoena demands do not contravene the First or Fourth Amendments to the Constitution, except as indicated below, and are reasonably related to the lawfully authorized powers of the Commission, it is hereby

ORDERED that the application be and the same is granted subject to the following conditions:

(1) Respondents shall not be required to furnish any document which solely relates to editorial policy or solely relates to information obtained as part of the process of gathering news for possible publication;

(2) The Commmission will act in accordance with the ruling in *Securities and Exchange Comm.* v. *Dresser In-*

dustries, Inc., No. 78-1702 (D.C. Cir. Nov. 19, 1979), so long as that ruling remains in force and effect.

(3) Nothing in the foregoing shall foreclose John P. McGoff from appropriately asserting any claim he may have under the Fifth Amendment.

And it is further

ORDERED that respondents' request for a stay is denied.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

December 12, 1979.

APPENDIX C

Subpoena Duces Tecum
UNITED STATES OF AMERICA
Securities and Exchange Commission

To Global Communications Corporation
c/o John P. McGoff
P.O. Box 1740, East Lansing, Michigan.

At the instance of the U.S. Securities and Exchange Commission you are hereby required to appear before Burton W. Wiand, Harry Polansky and A. Barry Morewitz, Officers of the Securities and Exchange Commission, at 500 North Capitol Street, Room 560 in the City of Washington, D.C. 20549 on the 30th day of July, 1979, at 10:00 o'clock a.m. of that day, to testify in the Matter of Panax Corporation et al., involving a private investigation ordered by the Commission pursuant to Section 21(a) of the Securities Exchange Act of 1934.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

SEE ATTACHMENT

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Washington, D.C. this 13th day of July, 1979.

[SEAL]

/s/ A. Barry Morewitz
A. Barry Morewitz, Officer

ATTACHMENT

As used herein, "documents" means all original writings of any nature whatsoever and all non-identical copies thereof (whether different from originals by reason of notation made on such copies of otherwise), correspondence, and wire messages and other correspondence or communications, notes, memoranda, telephone logs, desk calendars, diaries, appointment books, agenda, minutes and resolutions of any meetings formal or informal of any board of directors or committees thereof, records, or recordings of conferences, meetings, interviews, or telephone conversations, bank statements, deposit and withdrawal slips, notices of wire transfers of funds or other notices, cancelled checks or other checks, financial records, and statements, all books of accounts, brokerage account records, loan agreements, leasing or rental agreements, monthly savings and checking account statements, confirmation slips, order tickets and other brokerage records, cash receipt and disbursement journals, promissory notes, contracts, agreements, voice recordings, film, reports, tapes and other data compilation from which information can be obtained.

I

For the period January 1, 1971 to the present date hereof, any and all documents concerning or involving, reflecting or relating directly or indirectly:

A. Any and all transactions, business interests, contacts, or dealings with the Republic of South Africa or any of its political subdivisions, governmental officials (whether or not in their official capacity) political candidates or political parties.

B. Any and all receipts, disbursements, acquisitions, or dispositions of any and all funds, directly or indirectly from, to or of the Republic of South Africa.

C. Any and all transactions or proposed transactions (including but not limited to purchases, sales, hypothecations, transfer, receipts or deliveries) involving the securities of or belonging to:

1. Panax Corp.;
2. Global Communications Corp.;
3. Star Newspaper Company;
4. Sacramento Publishing Co.;
5. Suburbia Reporter News Group Inc.;

D. Any and all business dealings, contacts, loans, guarantees, transactions, or proposed transactions with Union Bank of Switzerland or Thesaurus Continental Securities Corp.

E. The incorporation and capitalization of Global Communications Corp., Star Newspaper Company, or any affiliates, parents, or subsidiaries.

F. Any and all transactions, business interests, contacts or dealings concerning any proposed acquisition of a publication known as the Washington Star, a daily newspaper in Washington, D.C.

G. Any and all transactions, business interests contacts or dealings concerning the acquisition or disposition of a publication known as the Sacramento Union, a daily newspaper in Sacramento, California.

H. Any and all transactions, business interests contacts or dealing concerning the acquisition or disposition of publications known collectively as Suburbia Reporter News Group Inc.

I. Any and all transactions, business interests, contacts, or dealings with any of the persons or entities set forth below:

1. L.E.S. Devilliers;
2. C. Mulder;
3. Republic of South Africa or any officials or employees thereof;
4. Eschel Rhoodie;
5. D.O. Rhoodie;
6. Gerald Browne;
7. Sidney Barron;
8. John Vorster.

II

For the period January 1, 1971 to the present date hereof, all financial records, including but not limited to, books of account, financial statements, cash receipts, and disbursement journals or any other ledgers, journals, or books of entry or books of account which relate directly or indirectly to:

1. Global Communications Corp. or any affiliates, parents or subsidiaries;
2. Star Newspaper Company or any affiliates, parents or subsidiaries;
3. Sacramento Publishing Co. or any affiliates, parents or subsidiaries;

III

For the period January 1, 1971 to the present date hereof, all federal and state income tax returns or other reports or returns filed with the Internal Revenue Service or other state, local and foreign taxing or revenue authorities.

ROUTINE USE OF INFORMATION FURNISHED TO THE SECURITIES AND EXCHANGE COMMISSION

The routine uses which may be made of the information supplied may include one or more of the following:

1. To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, and securities self-regulatory organizations.

2. By SEC personnel for purposes of investigating possible violations of the Federal securities laws.

3. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system or records may be referred to the appropriate agency, whether federal, state, local, foreign or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation or order issued pursuant thereto.

4. In any proceeding where the Federal securities laws are in issue or in which the Commission or past or present members of its staff is a party or otherwise involved in an official capacity.

5. To a federal, state or local governmental authority maintaining civil criminal or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to an agency decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting

of a contract, or the issuance of a license, grant or other benefit.

6. To a federal, state or local governmental authority, in reponse to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7. In connection with proceedings by the Commission pursuant to Rule 2(e) of its Rules of Practice, 17 CFR 201.2(e).

8. When considered appropriate, records in this system may be referred to a bar association or similar federal, state or local licensing authority for possible disciplinary.

9. In connection with investigations or disciplinary proceedings by a state securities regulatory authority or by a securities self-regulatory organization involving one or more of its members.

10. As a data souce for management information for production of summary descriptive statistics and analytical studies in support of the function for which descriptive statistics and analytical studies in support of the function for which the records are collected and maintained or for related personnel management functions or manpower studies, and to respond to general requests for statistical information (without personal identification of individuals) under the Freedom of Information Act or to locate specific individuals for personnel research or other personnel management functions.

11. In connection with their regulatory and enforcement responsibilities mandated by the Federal securities laws (as defined in section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)), or state or foreign laws regulating securities or other related matters, records may be disclosed to national securities associations that are registered with the Commission, the Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, the federal banking authorities, including but not limited to, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, state securities regulatory or law enforcement agencies or organizations, or regulatory law enforcement agencies of a foreign government.

12. To any trustee, receiver, master, special counsel, or other individual or entity that is appointed by a court of competent jurisdiction or a result of an agreement between the parties in connection with litigation or administrative proceedings involving allegations of violations of the Federal securities laws (as defined in Section 21(g) of the Securities Exchange Act 15 U.S.C. 78u(g)) or the Commission's rules of practice, 17 CFR 202.1 *et seq.* or otherwise, where such trustee, receiver, master, special counsel or other individual or entity is specifically designated to perform particular functions with respect to, or as a result of, the pending action or proceeding or in connection with the administration and enforcement by the Commission of the Federal securities laws or the Commission's Rules of Practice.

13. To any person during the course of any inquiry or investigation conducted by the Commission's staff, or in connection with civil litigation, if the staff has reason to believe that the person to whom the record is disclosed

may have further information about the matters related therein, and those matters appeared to be relevant at the time to the subject matter of the inquiry.

14. To any person with whom the Commission contracts to reproduce, by typing, photocopy or other means, any record within this system for use by the Commission and its staff in connection with their official duties or to any person who is utilized by the Commission to perform clerical or stenographic functions relating to the official business of the Commission.

15. Inclusion in reports published by the Commission pursuant to authority granted in the Federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)).

16. To members of advisory committees that are created by the Commission or by the Congress to render advice and recommendations to the Commission or to the Congress to be used solely in connection with their official, designated functions.

17. To any person who is or has agreed to be subject to the Commission's Rules of Conduct, 17 CFR 200.785-1 *et seq.*, and who assists in the investigation by the Commission of possible violations of Federal securities laws (as defined in Section 21(g) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(g)), in the preparation or conduct of enforcement actions brought by the Commission for such violations, or otherwise in connection with the Commissions's enforcement or regulatory functions under the Federal securities laws.

18. Disclosure may be made to a Congressional Office from the record of an individual in response to an inquiry from the Congressional Office made at the request of that individual.

19. To respond to inquiries from Members of Congress, the press and the public which relate to specific matters that the Commission has investigated and to matters under the Commission's jurisdiction.

20. To prepare and publish information relating to violations of the Federal securities laws as provided in 15 U.S.C. 78u(a), as amended.

21. In processing registration statements and periodic reports and other documents required to be filed with the Commission under provisions of the Federal securities laws and in responding to inquiries from Members of Congress or the public concerning a registrant and in preparing no-action letters.

SEC 1660 (7-77)

Subpoena Duces Tecum
UNITED STATES OF AMERICA
Securities and Exchange Commission

To Sacramento Publishing Company
c/o John P. McGoff
P.O. Box 1740
East Lansing, Michigan

At the instance of the U.S. Securities and Exchange Commission you are hereby required to appear before Burton W. Wiand, Harry Polansky and A. Barry Morewitz, Officers of the Securities and Exchange Commission, at 500 North Capitol Street, Room 560 in the City of Washington, D.C. 20549 on the 30th day of July, 1979, at 10:00 o'clock a.m. of that day, to testify in the Matter of Panax Corporation et al., involving a private investigation ordered by the Commission pursuant to Section 21(a) of the Securities Exchange Act of 1934.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

SEE ATTACHMENT

Fail not at your peril.

In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Washington, D.C. this 13th day of July, 1979.

[SEAL]

/s/ A. Barry Morewitz
A. Barry Morewitz, Officer

ATTACHMENT

As used herein, "documents" means all original writings of any nature whatsoever, and all non-identical copies thereof (whether different from originals by reason of notation made on such copies of otherwise), correspondence, and wire messages and other correspondence or communications, notes, memoranda, telephone logs, desk calendars, diaries, appointment books, agenda, minutes and resolutions of any meetings formal or informal of any board of directors or committees thereof, records, or recordings of conferences, meetings, interviews, or telephone conversations, bank statements, deposit and withdrawal slips, notices of wire transfers of funds or other notices, cancelled checks or other checks, financial records, and statements, all books of accounts, brokerage account records, loan agreements, leasing or rental agreements, monthly savings and checking account statements, confirmation slips, order tickets and other brokerage records, cash receipt and disbursement journals, promissory notes, contracts, agreements, voice recordings, film, reports, tapes and other data compilation from which information can be obtained.

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1. Panax Corp.;
2. Global Communications Corp.;
3. Star Newspaper Company;
4. Sacramento Publishing Co.;
5. Suburbia Reporter News Group Inc.;

D. Any and all business dealings, contacts, loans, guarantees, transactions, or proposed transactions with Union Bank of Switzerland or Thesaurus Continental Securities Corp.

E. The incorporation and capitalization of Global Communications Corp., Star Newspaper Company, or any affiliates, parents, or subsidiaries.

F. Any and all transactions, business interests, contacts or dealings concerning any proposed acquisition of a publication known as the Washington Star, a daily newspaper in Washington, D.C.

G. Any and all transactions, business interests contacts or dealings concerning the acquisition or disposition of a publication known as the Sacramento Union, a daily newspaper in Sacramento, California.

H. Any and all transactions, business interests contacts or dealing concerning the acquisition or disposition of

publications known collectively as Suburbia Reporter News Group Inc.

I. Any and all transactions, business interests, contacts, or dealings with any of the persons or entities set forth below:

1. L.E.S. Devilliers;
2. C. Mulder;
3. Republic of South Africa or any officials or employees thereof;
4. Eschel Rhoodie;
5. D.O. Rhoodie;
6. Gerald Browne;
7. Sidney Barron;
8. John Vorster.

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2. Star Newspaper Company or any affiliates, parents or subsidiaries;
3. Sacramento Publishing Co. or any affiliates, parents or subsidiaries;

III

For the period January 1, 1971 to the present date hereof, all federal and state income tax returns or other reports or returns filed with the Internal Revenue Service or other state, local and foreign taxing or revenue authorities.

[Routine Uses Notice deleted]

Subpoena Duces Tecum
UNITED STATES OF AMERICA
Securities and Exchange Commission

To John P. McGoff
Route 2, 182A, Williamston, Michigan

At the instance of the U.S. Securities and Exchange Commission you are hereby required to appear before Burton W. Wiand, Harry Polansky and A. Barry Morewitz, Officers of the Securities and Exchange Commission, at 500 North Capitol Street, Room 560 in the City of Washington, D.C. 20549 on the 30th day of July, 1979, at 10:00 o'clock a.m. of that day, to testify in the Matter of Panax Corporation, et al., involving a private investigation ordered by the Commission pursuant to Section 21(a) of the Securities Exchange Act of 1934.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

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In testimony whereof, the seal of the Securities and Exchange Commission is affixed hereto, and the undersigned, a member of said Securities and Exchange Commission, or an officer designated by it, has hereunto set his hand at Washington, D.C. this 13th day of July, 1979.

[SEAL]

/s/ A. Barry Morewitz
A. Barry Morewitz, Officer

ATTACHMENT

As used herein, "documents" means all original writings of any nature whatsoever and all non-identical copies thereof (whether different from originals by reason of notation made on such copies of otherwise), correspondence, and wire messages and other correspondence or communications, notes, memoranda, telephone logs, desk calendars, diaries, appointment books, agenda, minutes and resolutions of any meetings formal or informal of any board of directors or committees thereof, records, or recordings of conferences, meetings, interviews, or telephone conversations, bank statements, deposit and withdrawal slips, notices of wire transfers of funds or other notices, cancelled checks or other checks, financial records, and statements, all books of accounts, brokerage account records, loan agreements, leasing or rental agreements, monthly savings and checking account statements, confirmation slips, order tickets and other brokerage records, cash receipt and disbursement journals, promissory notes, contracts, agreements, voice recordings, film, reports, tapes and other data compilation from which information can be obtained.

I

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1. Panax Corp.;
2. Global Communications Corp.;
3. Star Newspaper Company;
4. Sacramento Publishing Co.;
5. Suburbia Reporter News Group Inc.;

D. Any and all business dealings, contacts, loans, guarantees, transactions, or proposed transactions with Union Bank of Switzerland or Thesaurus Continental Securities Corp.

E. The incorporation and capitalization of Global Communications Corp., Star Newspaper Company, or any affiliates, parents, or subsidiaries.

F. Any and all transactions, business interests, contacts or dealings concerning any proposed acquisition of a publication known as the Washington Star, a daily newspaper in Washington, D.C.

G. Any and all transactions, business interests contacts or dealings concerning the acquisition or disposition of a publication known as the Sacramento Union, a daily newspaper in Sacramento, California.

H. Any and all transactions, business interests contacts or dealing concerning the acquisition or disposition of publications known collectively as Suburbia Reporter News Group Inc.

I. Any and all transactions, business interests, contacts, or dealings with any of the persons or entities set forth below:

1. L.E.S. Devilliers;
2. C. Mulder;
3. Republic of South Africa or any officials or employees thereof;
4. Eschel Rhoodie;
5. D.O. Rhoodie;
6. Gerald Browne;
7. Sidney Barron;
8. John Vorster.

II

For the period January 1, 1971 to the present date hereof, all financial records, including but not limited to, books of account, financial statements, cash receipts, and disbursement journals or any other ledgers, journals, or books of entry or books of account which relate directly or indirectly to:

1. Global Communications Corp. or any affiliates, parents or subsidiaries;
2. Star Newspaper Company or any affiliates, parents or subsidiaries;
3. Sacramento Publishing Co. or any affiliates, parents or subsidiaires;

[Routine Uses Notice deleted]

APPENDIX D

In the
UNITED STATES DISTRICT COURT
For the District of Columbia

SECURITIES AND EXCHANGE COMMISSION, *Applicant,*	)	
v.	)	Misc. No. 79-0208
JOHN P. McGOFF, GLOBAL COMMUNICATIONS CORP., SACRAMENTO PUBLISHING CO., *Respondents.*	)	

RESPONDENTS' INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS

Respondents, pursuant to Rules 33 and 34, Federal Rules of Civil Procedure, hereby address the following interrogatories and request for production of documents to the Securities and Exchange Commission. The interrogatories and request for production of documents shall be answered by an officer or agent of the Applicant who is in a position to have first hand knowledge of the subject matter of the discovery requests.

INTERROGATORIES

(1) State (a) your name, (b) official position with the Securities and Exchange Commission, and (c) the period of time you have held that position with the Commission.

(2) Identify by name and official position with the Commission, the person(s) who initiated the preliminary

inquiry by the Division of Enforcement described in Burton W. Wiand's letter of July 3, 1979, to Raymond G. Larroca (Exhibit A hereto).

(3) State whether the persons(s) identified in the answer to interrogatory #2 initiated the preliminary inquiry on the basis of, in whole or in part, contact(s), direct or indirect, with any officer, agent or employee of the Department of State or any other federal agency, a member or representative of a member of Congress, a member or representative of a member of a congressional staff, an agent or representative of the President or White House staff, or an agent or representative of a foreign government (whether from the executive, legislative, or judicial branch) or foreign political party.

(4) If the answer to interrogatory #3 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(5) Identify by name and official position with the Commission, the person who made the decision to seek an Order from the Commission directing a private investigation and designating officers to take testimony in this matter.

(6) State whether the person(s) identified in the answer to interrogatory #5 made said decision on the basis of, in whole or in part, contact(s), direct or indirect, with any officer, agent, or employee of the Department of State or any other federal agency, a member or representative of a member of Congress, a member or representative of a member of a congressional staff, an agent or representative of the President or White House staff, or an agent or representative of a foreign government, (whether from

the executive, legislative or judicial branch) or foreign political party.

(7) If the answer to interrogatory #6 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(8) State whether any of the Commissioners voted to initiate a private investigation in this matter on the basis of, in whole or in part, contact(s), direct or indirect, with any officer, agent or employee of the Department of State or any other federal agency, a member or representative of a member of Congress, a member or representative of member of a congressional staff, an agent or representative of the President or White House staff, or an agent or representative of a foreign government (whether from the executive, legislative or judicial branch) or foreign political party.

(9) If the answer to interrogatory #8 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting, or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(10) State whether any commissioner, officer or agent of the Commission has had any contact(s), direct or indirect, with any officer, agent or employee of the Department of Justice concerning this investigation or its subject matter, either before or after its initiation.

(11) If your answer to interrogatory #10 is in the affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(12) State whether any commissioner, officer or agent of the Commission has had any contact(s), direct or indirect, with any member or representative of a member of Congress, or any member or representative of member of a congressional staff concerning this investigation or its subject matter, either before or after its initiation.

(13) If your answer to interrogatory #12 is affirmative, describe the date, type of contact, (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(14) State whether any commissioner, officer or agent of the Commission has had any contact(s), direct or indirect, with any commissioner, officer, agent or employee of the Federal Communications Commission concerning this investigation or its subject matter, either before or after its initiation.

(15) If your answer to interrogatory #14 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting, or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(16) State whether any commissioner, officer or agent of the Commission has had any contact(s), direct or indirect, with any officer, agent or employee of the Department of State concerning this investigation or its subject matter, either before or after its initiation.

(17) If your answer to interrogatory #16 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(18) State whether any commissioner, officer or agent of the Commission has had any contact(s), direct or indirect, with any agent or representative of the President or the White House staff concerning this investigation or its subject matter, either before or after its initiation.

(19) If your answer to interrogatory #18 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(20) State whether any commissioner, officer or agent of the Commission has had contact(s), direct or indirect, with any officer, agent or representative of any other federal agency, not described in interrogatories #2-19 above, concerning this investigation or its subject matter, either before or after its initiation.

(21) If your answer to interrogatory #20 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person (including title and federal agency which he or she represents) with whom the contact occurred, and the substance thereof, for each contact forming the basis of your affirmative answer.

(22) State whether any commissioner, officer or agent of the Commission had had contact(s), direct or indirect, with any agent or representative of a foreign government, whether from the executive, legislative or judicial branch, or foreign political party concerning this investigation or its subject matter, either before or after its initiation.

(23) If your answer to interrogatory #22 is affirmative, describe the date, type of contact (*i.e.*, telephone, personal meeting or otherwise), person (including title and foreign government or political party which he or she represents) with whom the contact occurred, and the substance

thereof, for each contact forming the basis of your affirmative answer.

(24) Identify by date, title (if any) and author, every memorandum, letter, note or other writing evidencing or embodying, referring or relating to any contact described in your answer to interrogatories # 2-23 above.

REQUEST FOR PRODUCTION OF DOCUMENTS

Produce to respondents' counsel for inspection and copying every memorandum, letter, note or other writing identified in your answer to interrogatory #24 above.

The responses to these discovery requests should be served on undersigned counsel on the date set by the Court.

/s/ Raymond G. Larroca
RAYMOND G. LARROCA

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APPENDIX E

(From the *Los Angeles Times,* April 17, 1981, p. 8)

PUBLISHER McGOFF REPORTEDLY DIVERTED SECRET SOUTH AFRICAN FUNDS TO OWN USE

By RONALD J. OSTROW and ROBERT L. JACKSON, Times Staff Writers

WASHINGTON—Federal investigators, after a two-year inquiry, have found evidence that newspaper publisher John P. McGoff diverted South African funds to his personal use while allegedly serving as a secret agent of that country in the United States.

McGoff, of East Lansing, Mich., used some of the foreign money for his swimming pool, boat and house, federal sources said. But most of the $11 million he allegedly received went for secret purchases of newspaper stock, they said.

McGoff, who is under investigation by the Justice Department and the Securities and Exchange Commission, has strongly denied being "an agent or front for any foreign government." His newspaper properties include the Sacramento Union, of which he is publisher and part owner.

He was unavailable for comment Thursday.

'Hard-Driving Businessman'

Raymond G. Larroca, his Washington attorney, said of the allegations that his client had misused foreign funds: "I certainly don't know of anything like that. I cannot conceive of John McGoff doing anything like that. My im-

pression is he's a hard-driving businessman but a straight arrow."

The U.S. government has notified South African Embassy officials of some developments in the McGoff investigation in recent weeks, it was learned. One source said the diplomats "were appalled" to hear that McGoff, long a conservative supporter of South African policies, allegedly had misspent funds from their government.

Clandestine Disbursements

This source, like several others interviewed by The Times, agreed to provide information about the investigation only on the condition that he not be identified by name or agency affiliation.

McGoff's name figured in a 1979 report by the South African government on a secret $37-million propaganda campaign directed by former Prime Minister John Vorster and his information minister, Cornelius Mulder.

The Erasmus Judicial Commission, which prepared the report, condemned the clandestine disbursement of government funds to improve South Africa's image in the United States, Britain, West Germany, Japan and other countries.

The Erasmus Commission — named after the South African judge who was its chairman — charged that McGoff had received $11 million from Mulder in 1974 to try to purchase the Washington Star, the capital's only afternoon newspaper. When that deal fell through, McGoff used $6 million to buy the Sacramento Union, the commission said.

McGoff's lawyers have said in federal court papers that the commission report amounted only to allegations that

McGoff "may have borrowed funds which ultimately may have originated in South Africa."

SEC investigators, in an effort to enforce subpoenas, which McGoff has fought, told U.S. District Judge Gerhard A. Gesell in December 1979, that McGoff had received South African funds and "carried out the wishes of the Ministry of Information."

Two sources familiar with the SEC investigation said that agency believes it now has solid evidence that McGoff used South African funds to buy more than 400,000 shares of stock in Panax Corp., a publicly held corporation that once owned 65 small newspapers. Failure to disclose that foreign funds were used for such a purchase is a violation of federal law.

Larroca said McGoff intends to carry his subpoena fight with the SEC to the Supreme Court on the ground that his First Amendment rights as a publisher should protect him from such government intrusion. The U.S. Court of appeals here rejected that argument in February.

SEC investigators already have obtained considerable documentation for their case, according to sources close to the investigation.

Conclusion of a federal grand jury investigation of McGoff reportedly is still months away. If charges result, the primary allegation is expected to be that McGoff did not register with the Justice Department as a South African agent, according to sources familiar with the case. Alleged diversion of funds could constitute a secondary fraud charge.

McGoff, meanwhile, has sought to maintain his political connections. At the Republican National Convention in Detroit last summer, he was host to former

President Gerald R. Ford aboard his 96-foot yacht, the Global Star, in the Detroit River.

No. 80-1852

JUN 1 1981
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. McGOFF, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court, in ordering enforcement of the Commission's investigatory subpoenas, sufficiently accommodated petitioners' First Amendment interests by narrowing the scope of the Commission's subpoenas to exclude any documents relating solely to editorial policy or news gathering.

2. Whether the district court correctly entered a protective order against discovery into the deliberative processes leading to the Commission's decision to institute an investigation of petitioners' activities.

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SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not yet reported. The orders of the district court (Pet. App. 17a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1981. The petition for a writ of certiorari was filed on May 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 1979, the Securities and Exchange Commission ordered an investigation to determine whether Panax Corporation (a publicly-held corporation engaged in the newspaper publishing business) and petitioners John P. McGoff (president and director of Panax), Global Communications Corporation (a holding company wholly owned by McGoff), and Sacramento Publishing Company (a wholly owned subsidiary of Global), had violated anti-fraud, reporting, beneficial ownership, and proxy provisions of the federal securities laws (A. 4-5).[1]

The Commission initiated its investigation following the receipt of information indicating that petitioners acquired approximately 40% of Panax's outstanding stock (A. 15-16, 159-162) without making the disclosures required by the federal securities laws respecting the source of the funds used to make the acquisition,[2] and that thereafter petitioners, in a self-

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[1] See Sections 10(b), 13(a), 13(d) and 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), 78m(a), 78m(d) and 78n(a); and Rules 10b-5, 12b-20, 13a-1, 13a-11, 13a-13, 13d-1, 13d-2, 14a-3 and 14a-9 thereunder, 17 C.F.R. 240.10b-5, 240.12b-20, 240.13a-1, 240.13a-11, 240.13a-13, 240.13d-1, 240.13d-2, 240.14a-3 and 240.14a-9. ("A." refers to the joint appendix in the court of appeals.)

[2] The information leading to the investigation included an official, published report of the Erasmus Commission, a judicial commission appointed by the South African government. The Erasmus Commission reported that the South African government had been interested in financing the purchase of news organizations in order to create favorable public opinion concerning South Africa (A. 153-154, 166-172), and that the South African government had given McGoff $11.3 million for this purpose (A. 153-154, 159-160). Shortly after receiving these funds from the South African government,

dealing transaction, utilized the assets of Panax itself to repay the funds they had used to make the original purchases.[3]

Acting pursuant to the Commission's order of investigation, Commission staff members issued subpoenas duces tecum to petitioners on July 13, 1979 (A. 13, 22-39). Those subpoenas called for the production of documents pertaining to, among other things, the persons who had advanced funds to petitioners and petitioners' transactions involving securities issued by or belonging to Panax, Sacramento and Global.

2. Petitioners refused to comply with the subpoenas and the Commission sought enforcement in the United States District Court for the District of Columbia. Petitioners then served interrogatories and a document production demand on the Commission for the stated purpose of determining whether the Commission's investigation was part of a coordinated effort by the United States government to

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petitioners, according to public reports filed by them with the Commission, began making substantial purchases of the stock of Panax, which publishes daily and weekly newspapers in the United States (A. 160-161).

Although petitioners purported to comply with Section 13(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(d), which required them to file reports with the Commission disclosing certain information concerning their financing arrangements for the purchases of Panax stock, petitioners' reports contained no reference to the use of South African funds or to any arrangements or understanding with the South African government (A. 161-163, 182-198). Likewise, no disclosure of such matters was made in Panax's annual or periodic reports, or in proxy solicitation materials.

[3] Petitioners obtained $1 million in cash from Panax in exchange for certain assets (A. 162).

harass petitioner McGoff (Pet. App. 38a-43a). The Commission moved for a protective order.

Following a hearing, the district court granted the Commission's motion and precluded petitioners' attempted discovery (Pet. App. 17a). The district court also found that the Commission's subpoena demands were "reasonably related to the lawfully authorized powers of the Commission" (*id.* at 18a). The court ruled, however, that petitioners were not required to furnish "any document which solely relates to editorial policy or solely relates to information obtained as part of the process of gathering news for possible publication" (*ibid*). The district court also expressly reserved the right of petitioner McGoff to assert any claim he may have under the Fifth Amendment (*id.* at 19a).

3. The court of appeals affirmed (Pet. App. 1a-16a). The court observed that petitioners, having voluntarily associated themselves with a publicly-held corporation, "enjoy no special privilege as 'press entities' to withhold information others must furnish to the investing public" (*id.* at 8a). The court also noted that the violations subject to investigation were not merely "minor infraction[s] of a technical rule" (*id.* at 12a). The court of appeals emphasized that the federal securities laws are laws of general applicability that do not directly regulate First Amendment rights and that persons engaged in the business of publishing are not exempt from those laws. In light of this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665, 701-706 (1972), the court of appeals rejected petitioners' argument that, because petitioners are engaged in publishing, the Commission's subpoenas should be subject to a special, more stringent standard (Pet. App. 11a).

The court noted, however, that "some balancing or special sensitivity is required in view of the vital function the press serves in a self-governing society" (Pet. App. 10a). The court concluded that the appropriate accommodation was achieved by the district court's ruling that documents relating solely to editorial policy or news gathering need not be produced. The court noted, in this regard, that the district court's order could be interpreted to allow petitioners to withhold both whole documents and segregable portions of documents that fall within the excepted categories (*id.* at 10a-11a), and that petitioner "McGoff, who was to make the judgment in the first instance whether an item fell within the exception, might have sought clarification from the district court if he genuinely believed the order did 'nothing to protect' his editorial or news gathering activity" (*id.* at 11a; footnote omitted).[4]

The court of appeals also agreed with the district court that petitioners had failed to establish that they were entitled to discovery into the Commission's deliberative processes in this summary subpoena enforcement proceeding. The court concluded that petitioners' "diffuse speculations concerning possible misuse of administrative authority" did not constitute a sufficient basis to permit intrusive discovery into the agency's internal deliberations (Pet. App. 16a). In this connection, the court observed that petitioners had failed to allege concrete facts warranting an inference of bias or harassment (*id.* at 15a) and that the Commission had a specific factual basis for suspecting that petitioners had violated the securities

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[4] The court of appeals rejected petitioners' argument that the subpoenas were broader than necessary. The court found that, while the demands were broad, they were proper because "the nature of the inquiry precludes a trim list of requests" (Pet. App. 18a).

laws. The court emphasized that the Commission based the investigation in significant part on "information revealed in an official, published report of the Republic of South Africa" (*ibid.*).[5]

4. Petitioners' motions for a stay of the district court's order were denied by the court of appeals and by this Court. 445 U.S. 922 (1980). Petitioners complied with the subpoenas subsequent to the decision of the court of appeals.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. Petitioners have complied with the subpoenas that they seek to challenge in this Court (Pet. App.

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[5] The Commission's application for enforcement of its subpoena, and the affidavit of its staff attorney, stated that the investigation was based on specific facts contained in the Erasmus Report and on documents filed with the Commission (A. 4-17). The affidavit stated that the Erasmus Report, which was the product of a Judicial Commission instituted by the South African government to inquire into irregularities in that government's former Department of Information, had received evidence from 91 witnesses and had compiled an extensive record. The Judicial Commission reported, among other things, that petitioner McGoff received in excess of $11 million from the South African government for the purpose of purchasing interests in news organizations (*id.* at 15-16). Shortly after this advance, petitioner McGoff began to acquire Panax stock (*id.* at 160). The filings submitted by petitioners to the SEC failed to disclose any financing by the South African government (*id.* at 161-162).

7a). Even if the present case is not technically moot,[6] this Court should not exercise its discretion to grant a petition for a writ of certiorari in a case in which the subpoenas at issue have been fully complied with, the factual and legal issues presented by petitioners are devoid of continuing practical significance, and any opinion rendered by the Court would have the characteristics of an advisory opinion.

2. Contrary to petitioners' contention on the merits (Pet. 14), the courts below did accord special consideration to their First Amendment concerns. In ordering enforcement of the Commission's subpoenas, the district court narrowed the subpoenas to exclude documents relating solely to "editorial policy" or "information obtained as part of the process of gathering news for possible publication" (Pet. App. 18a). The court of appeals expressly found that the subpoenas, as modified by the district court, fully accommodated petitioners' interests in avoiding "unnecessary encroachment upon McGoff's activities and associations as a newspaper publisher and writer" (*id.* at 10a). Nor is there merit to petitioners' assertion (Pet. 18) that the court of appeals made no "meaningful examination" of the propriety of the subpoenas. The court of appeals concluded, based on a detailed review of the subpoena requests, that the Commission had "shown 'a substantial relationship'

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[6] See *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979); *Barney* v. *United States*, 568 F.2d 116, 117 (8th Cir. 1978). But see *FTC* v. *Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *United States* v. *Friedman*, 532 F.2d 928, 931 (3d Cir. 1976); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970).

between the information sought and [the] important government interest" in assuring full disclosure to the investing public (Pet. App. 12a). The court also found that the Commission's subpoena demands were closely tailored to the subject matter of the inquiry (*id.* at 12a-13a). Thus, as the court of appeals expressly stated (*id.* at 12a-14a), even accepting petitioners' claim that a heightened standard of review is required, it is clear that the Commission's subpoenas should be enforced. There is no need for this Court to grant further review of these essentially factual determinations.

Petitioners nonetheless argue (Pet. 14) that, because they are engaged in the publishing business, the First Amendment requires that the Commission's subpoenas be subjected to a "strict scrutiny" standard of review. That argument is inconsistent with the decisions of this Court. See *New York Times Co.* v. *Jascalevich*, 439 U.S. 1317, 1322 (1978) (White, J., in Chambers) (summarizing cases); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566-567 (1978); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); see also *Herbert* v. *Lando*, 441 U.S. 153, 169-177 (1979). The standard for enforcement of Commission subpoenas was set forth in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). That case establishes that agency subpoenas should be enforced against publishers over First Amendment objections when the district court determines "that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry." *Id.* at 209 (footnote omitted); see also *id.* at 192-194.[7] This Court has rejected special standards for publishers even in connection with a search warrant authorizing entry into

a newspaper office to seize evidence—a substantially more intrusive method of obtaining information than a subpoena. *Zurcher* v. *Stanford Daily*, *supra*.

Moreover, here petitioners are suspected wrongdoers, not disinterested third-party witnesses.[8] The

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[7] As the court of appeals observed (Pet. App. 8a), persons engaged in the publishing business are not immune from application of regulatory statutes when they engage in commercial activities subject to those statutes. The treatment afforded publishers is no different from that afforded other businesses under general regulatory enactments. See, *e.g.*, *Associated Press* v. *NLRB*, 301 U.S. 103, 132 (1937) ("The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws"); *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 194 ("[T]he Act's purpose was to place publishers of newspapers upon the same plane with other businesses"); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) ("The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity"); *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-156 (1951) ("The injunction applies to a publisher what the law applies to others"); *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 150 (1967) (a business is not immune from regulation, including "[f]ederal securities regulation," because "it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others").

[8] One of the dissenting Justices in *Branzburg*, who argued in favor of a strict scrutiny test, observed that press entities are not entitled to First Amendment protection when, as here, they themselves are implicated in possible wrongdoing. *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 712 (Douglas, J., dissenting).

Commission's investigation focuses in substantial part on whether the Schedule 13D filings made by petitioners with the Commission concerning their ownership and control of Panax were false and misleading. Thus, this is not a case in which information is being sought from a newspaper reporter who has learned about the wrongful acts of others in the course of news gathering activities.[9]

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[9] Petitioners incorrectly assert (Pet. 16-18) that the decision of the court of appeals conflicts with *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963). That case did not involve entities or persons who themselves were suspected of having engaged in unlawful conduct. Furthermore, unlike *Gibson*, and unlike *United States* v. *Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980), this case does not involve compelled disclosure of the identity of members of or contributors to political organizations. Compare *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

Gibson does not aid petitioners for an additional reason. *Gibson* held that a contempt citation issued for refusal to provide a legislative committee with a political organization's membership list was violative of the First and Fourteenth Amendments because the record failed to "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." 372 U.S. at 546. This Court subsequently ruled in *Branzburg* that, assuming that the *Gibson* test applies to cases not involving membership or contributor lists, the test is fully satisfied—even with respect to newspaper reporters who are third-party witnesses—by a showing that (1) the government has a law enforcement interest in the matter being investigated, and (2) it appears likely that the subpoenaed members of the press "could supply information to help the government determine whether illegal conduct had occurred * * *." 408 U.S. at 701. There is no question that the Commission's subpoenas in this case meet those criteria.

Petitioners' reliance (Pet. 17-18) on *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972), which was handed

2. Petitioners' assertion (Pet. 7-11) that the district court erred in denying their demand for discovery into the Commission's deliberative processes leading to the initiation of its investigation is equally without merit. Petitioners do not dispute that subpoena enforcement proceedings are summary in nature and that district courts may, in their sound discretion, curtail or eliminate discovery as appropriate in such proceedings.[10]

While the precise formulation of the circumstances in which respondents in subpoena enforcement proceedings will be permitted even limited discovery against the government has varied among the courts of appeals, there is no conflict as to the relevant standard. Discovery is not granted in subpoena enforcement proceedings as a matter of course, as it is in other civil litigation. Discovery is available only after an initial showing has been made by the re-

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down one day after this Court's decision in *Branzburg*, is likewise misplaced. The Ninth Circuit panel, which apparently had utilized a strict scrutiny test, reconsidered its decision because of asserted conflicts with *Branzburg*. The court of appeals concluded that its decision could be reconciled with *Branzburg* because the panel held only that the government must "establish that there was a 'substantial connection' between the information sought and the criminal conduct" that the grand jury was investigating before members of the press could be held in contempt for refusing to answer questions. 466 F.2d at 1090-1091. To the extent that any of the discussion in *Bursey* conflicts with *Zurcher* and *Branzburg*, it has been superseded by those controlling decisions of this Court. In any event, the Commission's subpoenas here plainly met the test articulated in *Bursey* on rehearing.

[10] See Fed. R. Civ. P. 81(a)(3); *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971) (noting the "summary" nature of subpoena enforcement proceedings).

spondent that the ordinary presumption of regularity of government procedures should be displaced.[11]

No court of appeals has ordered discovery in a case similar to the present case.[12] The record below

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[11] As the District of Columbia Circuit has stated: "Discovery should be permitted only where the respondent is able to distinguish himself from 'the class of the ordinary [respondent].'" *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1388 (D.C. Cir.) (en banc), cert. denied, No. 80-354 (Nov. 17, 1980), quoting *United States* v. *Fensterwald*, 553 F.2d 231, 231-232 (D.C. Cir. 1977) (per curiam). See also *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), slip op. 21-22 (submission of "sufficient meaningful evidence" in support of specific and non-frivolous allegations justifies limited discovery); *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 42-43 n.9 (2d Cir.), cert. denied, 439 U.S. 822 (1978) (discovery appropriate in district court's sound discretion but only if respondent makes a "substantial preliminary showing"); *United States* v. *Moon*, 616 F.2d 1043, 1047 (8th Cir. 1980) (same); *United States* v. *Church of Scientology*, 520 F.2d 818, 824-825 (9th Cir. 1975) (discovery appropriate where respondent produces evidence supporting his allegations); *United States* v. *Salter*, 432 F.2d 697, 700 (1st Cir. 1970) (same); *United States* v. *National State Bank*, 454 F.2d 1249, 1252 (7th Cir. 1972) (mere allegations of improper purpose do not justify discovery); *United States* v. *Newman*, 441 F.2d 165, 169 (5th Cir. 1971) ("the summoned party must raise in a substantial way the existence of substantial deficiencies in the summons proceedings" before obtaining even limited discovery); *United States* v. *Roundtree*, 420 F.2d 845, 852 (5th Cir. 1969) (limited discovery of a case agent was proper where respondents made specific allegations that IRS systematically harassed them and the purpose of the investigation had sufficiently been put in issue).

[12] This case bears no resemblance to *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, *supra*, on which petitioners rely (Pet. 9). There is no basis for inferring that the *Wheeling-*

contained undisputed evidence that the Commission's investigation followed the public release of an official report, which, coupled with matters contained in documents filed with the Commission by petitioners themselves, strongly suggested that petitioners may have engaged in conduct violative of the federal securities laws. In addition, the Commission's counsel submitted an affidavit and declarations setting forth the Commission's basis for the investigation and the specific grounds for suspecting illegal activities. Those documents affirmed that the Commission's sole purpose in conducting the investigation was to determine whether violations of the federal securities laws had occurred.[13] Petitioners, who had the opportunity to counter the sworn statements submitted by the Commission's counsel, declined to do so (A. 217).[14] Thus, as the court of appeals stated (Pet.

Pittsburgh court would grant even limited discovery based on the "diffuse speculations concerning possible misuse of administrative authority" (Pet. App. 16a) involved in this case. In *Wheeling-Pittsburgh*, the subpoena recipient alleged that the investigation in question was the product of improper influence by a particular United States Senator who purportedly was rendering assistance to a rival company. The court emphasized that the subpoena recipient bears the "initial burden" of convincing the district court that it has raised a substantial objection to subpoena enforcement and that the "trial judge must evaluate the assertions of the recipient of the subpoena and any evidence introduced by both parties *before allowing substantial discovery*" (slip op. 21; emphasis added).

[13] In none of the cases cited by petitioners did the courts find that the government voluntarily came forward, as the Commission did here, with specific and undisputed evidence demonstrating a proper basis for the investigation.

[14] Some courts have suggested that a limited evidentiary hearing may be held based on a lesser showing than is necessary to grant discovery. See, *e.g.*, *United States* v. *Church of*

App. 16a), petitioners' entire argument for discovery against the Commission rested on nothing more than "diffuse speculations." [15]

Moreover, the subject matter of petitioners' broad ranging discovery requests—which inquired into the specific recommendations made by Commission staff members to the Commission with respect to petitioners' activities and the extent and nature of any contacts between Commission personnel and other persons prior to the commencement of the Commission's investigation (Pet. App. 38a-43a)—fall within the domain of governmental privilege. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975);

Scientology, supra, 520 F.2d at 824; *United States* v. *Salter, supra*, 432 F.2d at 700. The petitioners here, however, not only did not request an evidentiary hearing, but declined the invitation of the district court to present facts and arguments at the adversarial hearing that was held prior to issuance of the court's orders enforcing the Commission's subpoenas and denying petitioners' request for discovery (A. 217).

[15] Contrary to petitioners' contention (Pet. 11-13), the court below did not rule, either explicitly or implicitly, that the only purpose for which a party challenging an administrative subpoena may seek discovery is to demonstrate agency bad faith amounting to actual malicious intent. In explaining its determination that petitioners were not entitled to discovery, the court of appeals referred to that factor only in the course of distinguishing a case on which petitioners had heavily relied (Pet. App. 15a). And, in doing so, the court also referred to other factors—including the undisputed fact that the Commission had based its investigation in significant part on information contained in an official report of another government. Thus, the court's focus was not limited to malicious intent. Accordingly, even if petitioners are correct in interpreting *SEC* v. *Wheeling-Pittsburgh Steel Corp.*, No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), as holding that actual malicious intent of the agency need not be shown to establish a defense to subpoena enforcement, this case presents no conflict with that holding.

McCelland v. *Andrus*, 606 F.2d 1278, 1287 (D.C. Cir. 1979). Petitioners made no showing in the district court that would justify discovery into the privileged area of the administrative deliberative process.[16]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1981

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[16] As this Court recognized in *United States* v. *Morgan*, 313 U.S. 409, 422 (1941), it is "not the function of the court to probe the mental processes" of an administrative agency. "Just as a judge cannot be subjected to such a scrutiny * * * so the integrity of the administrative process must be equally respected." *Ibid.* The Court added that "although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." *Ibid.* These concerns have particularly great relevance to investigations, which should not be encumbered with mini-trials of the investigating body. *United States* v. *Calandra*, 414 U.S. 338, 349-352 (1974).

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No. 80-1852

JUN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN P. McGOFF, GLOBAL COMMUNICATIONS CORPORATION AND SACRAMENTO PUBLISHING COMPANY,

Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

REPLY BRIEF FOR PETITIONERS

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PARTIES

A list of the parties, including a list of subsidiaries and affiliates of Global Communications Corporation and Sacramento Publishing Company, may be found on page ii of the Petition for Certiorari.

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

1. The Basis For The Commission's Subpoenas.

The Commission in its opposition makes several statements about the basis for the Commission's investigation and its subpoenas, Brief in Opp. at 2-3, that require clarification.

First, the Commission states that it had received information "indicating that petitioners acquired approximately 40% of Panax's outstanding stock . . . without making the disclosures required by the federal securities laws." Brief in Opp. at 2. To support this statement, the Commis-

sion suggests that the Erasmus Report alleged that Petitioners used funds from South African sources to purchase Panax stock. Brief in Opp. at 2-3 & n.2. In fact, the Report alleges that the money was to be used solely for three specific transactions: (1) attempted acquisition by Petitioner McGoff of the *Washington Star* (A. 154, ¶10.22); (2) the purchase of a 50% share in UPITN, a London-based news agency (A. 154, ¶10.28); and (3) the purchase and operations of the *Sacramento Union* (A. 154, ¶10.27). *Nowhere* in the Report is Panax or Panax stock mentioned. The Erasmus Report simply does not support, and in fact refutes, the allegations that any South African funds were used to purchase Panax stock.[1]

Second, the Commission states that the Erasmus Report alleges that Petitioner received South African funds "for the purpose of purchasing interests in news organizations." Brief in Opp. at 6 n.5. In fact, the citation to the record used to support this statement is a citation not to the Report itself, but to the *affidavit of an SEC officer,* filed in connection with the subpoena enforcement proceedings before the district court. The Erasmus Report, however, upon which the Commission relied, only claims that South African funds were advanced to purchase a particular newspaper, the *Washington Star* (A. 153), and that when that fell through, the *Sacramento Union* and a part interest in UPITN were purchased instead (A. 154). Again, there was *no* link to Panax or

[1]The Commission attempts to broadbrush this glaring omission in the Report by stating that "shortly after" allegedly receiving the South African funds, petitioner "began making substantial purchases" of Panax stock. Brief in Opp. at 2-3 n.2. But the Commission's own records show that no "substantial" purchase of Panax stock was made until February, 1976, almost *one and one-half years* after the alleged receipt of South African funds. A. 183-188.

Panax newspapers in any of the information upon which the Commission relies.

Third, the Commission characterizes its subpoenas as calling for production of documents pertaining to "the persons who had advanced funds to petitioners," Brief in Opp. at 3. In fact, the subpoenas asked for documents pertaining to categories of persons far broader than that, with a far greater impact on Petitioners' associational rights:

> the Republic of South Africa or any of its political subdivisions, governmental officials (whether or not in their official capacity) political candidates or political parties.

Pet. App. 21a, 30a, 35a; *see also id.* at 22a-23a, 31a-32a, 36a-37a.

2. There Remains A Live Controversy For Disposition By This Court.

The Commission recognizes that this case is not moot, Brief in Opp. at 7 & n.6, but argues that any opinion by this Court would be "devoid of . . . practical significance." However, if this Court were to decide this case in Petitioners' favor, Petitioners would be entitled to the return of the documents and the exclusion of information they contain in any subsequent proceedings. *See FTC v. Gibson Products of San Antonio, Inc.*, 569 F.2d 900, 903 (5th Cir. 1978); *FTC v. Browning,* 435 F.2d 96, 97-98 & n.1 (D.C. Cir. 1970). *See also* Pet. App. 7a n.4. Moreover, the public interest in having the parameters of agency authority definitively settled weighs heavily against finding the case moot. *See United States v. W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *Lyons v. City of Los Angeles,* 615 F.2d 1243, 1248 n.10 (9th Cir.), *cert. denied,* 101 S.Ct. 333 (1980).

3. No Case Cited By The Commission Undermines Petitioners' Assertion That The Subpoena Must Be Tested Under The Strict Scrutiny Standard Applicable To Governmental Actions That Impinge On First Amendment Freedoms.

Contrary to the Commission's contention, Petitioners do not assert that they are entitled to special consideration only because they are "engaged in the publishing business." Brief in Opp. at 8. They also assert that the subpoena infringes on their First Amendment rights of *association,* by requiring them to disclose relationships and dialogues with certain named individuals and other entities. The Commission cites no case that holds that such infringement may be permitted without the searching inquiry required under *NAACP v. Alabama,* 357 U.S. 449 (1958), and its progeny. *Branzburg v. Hayes,* 408 U.S. 665 (1972), decided only that reporters' rights under the First Amendment are not unqualified. *See Zerilli v. Smith,* No. 79-2466, slip op. at 12-14 (D.C. Cir. April 13, 1981); *Riley v. City of Chester,* 612 F.2d 708, 714 (3d Cir. 1979). Moreover, *Branzburg* did not deal with the associational aspect present in this case. *Zurcher v. Stanford Daily,* 436 U.S. 547 (1978), likewise rejected only a "nearly *per se*" ban against search warrants directed to newspaper publishers, 436 U.S. at 563; in fact, this Court in *Zurcher* reaffirmed that where First Amendment interests are at stake, the Fourth Amendment must be applied with "scrupulous exactitude." *Id.* at 564.

The Commission's attempts to distinguish or undermine the cases relied upon by Petitioners also must fail. The fact that *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539 (1963), "did not involve entities or persons who themselves were suspected of having engaged in unlawful conduct," Brief in Opp. at 10 n.9, does not alter

the standard to be applied, but merely constitutes a factor to be considered in determining whether a compelling governmental interest has been shown. 372 U.S. at 547-48. Nor is the fact that "this case does not involve compelled disclosure of the identity of members of or contributors to political organizations," Brief in Opp. at 10 n.9, dispositive. This Court held in *Gibson* that it is "the claim . . . that particular . . . inquiries and demands infringe substantially upon First and Fourteenth Amendment associational rights of individuals," and not the manner of that infringement, which warrants the close scrutiny of the subpoena. 372 U.S. at 545. *Branzburg v. Hayes,* 408 U.S. 665 (1972) did not eviscerate the test announced in *Gibson* insofar as associational rights are involved. *See* p. 4, *supra; see also, Bursey v. United States,* 466 F.2d 1059, 1091 (9th Cir. 1972) (*Branzburg* "does not purport to disavow the balancing standards enunciated" in *Gibson*). Finally, the Ninth Circuit's decision in *Bursey* directly conflicts with the decision in this case. The Commission's suggestion that *Branzburg* superseded *Bursey,* Brief in Opp. at 10-11 n.9, is incorrect: the Ninth Circuit reconsidered its decision after *Branzburg,* and concluded that *Branzburg* was "not inconsistent with either our reasoning or the result we have reached." 466 F.2d at 1090.

4. The Lower Courts' Decisions Denying Discovery Are In Conflict With The Decisions of Other Circuits.

We contend that the standard for allowing discovery against a governmental agency applied by the court of appeals in this case is in direct conflict with the standards enunciated by at least four other circuits. *See* Pet. at 9-10. The First, Fifth and Ninth Circuit cases cited by the Commission to support its contention that no conflict exists,

Brief in Opp. at 12 n.11, in fact all recognized that the subpoena recipient "must be afforded at least *some* opportunity to substantiate its allegations," and thus all allowed at least limited discovery. *United States v. Church of Scientology,* 520 F.2d 818, 824-25 (9th Cir. 1975) (emphasis in original); *accord, United States v. Salter,* 432 F.2d 697, 700-01 (1st Cir. 1970); *United States v. Roundtree,* 420 F.2d 845, 852 (5th Cir. 1969).[2] Moreover, the Commission's statement that "[i]n none of the cases cited by petitioners did the courts find that the government voluntarily came forward . . . with specific and undisputed evidence," Brief in Opp. at 13 n.13, is incorrect. In *United States v. Roundtree* the court found that the Commission had "denied [the] allegations and submitted affidavits to buttress its position." 420 F.2d at 851.

In particular, the Commission's attempt to distinguish *SEC v. Wheeling-Pittsburgh Steel Corp.,* No. 80-1375 (3d Cir. Jan. 21, 1981) (en banc), is unsuccessful. The Com-

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[2]In the First and Ninth Circuits, the appropriate discovery procedure is an evidentiary hearing at which the party challenging the subpoena is permitted to take the testimony of agency personnel. *United States v. Church of Scientology, supra; United States v. Salter, supra.* In the Fifth Circuit, the appropriate procedure is either an evidentiary hearing, *United States v. Wright Motor Co.,* 536 F.2d 1090 (5th Cir. 1976), or taking the depositions of agency personnel, *United States v. Roundtree, supra.* In the District of Columbia Circuit, however, the appropriate procedure is interrogatories to the agency. *United States v. Fensterwald,* 553 F.2d 231 (D.C. Cir. 1977). Thus, counsel for Petitioners did not – as the Commission would have the Court believe – "decline[ ] the invitation of the district court to present facts and arguments at the adversarial hearing," Brief in Opp. at 14 n.14, but rather followed the procedures authorized by the District of Columbia Circuit by submitting interrogatories instead. Indeed, there was *no* "invitation" by the district court "to present facts" at the hearing on the motion to quash.

mission characterizes the challenge to the subpoena in *Wheeling-Pittsburgh Steel* as based on "improper influence by a particular United States Senator," Brief in Opp. at 13 n.12. The only difference between our allegations and those in *Wheeling-Pittsburgh Steel* is that we are unable to name the individual or individuals in the administration who may have influenced the Commission's determination to begin an investigation. We have, however, described circumstances that suggest both a strong likelihood that such an individual exists and a powerful motivation for the harrassment of Mr. McGoff. *See* Pet. at 5-6, 12-13 & n.10.

Finally, the Commission's brief demonstrates that it has engaged in the same implicit presumption that the court of appeals did: that Petitioners must demonstrate bad faith or malicious intent on the part of the agency in order to quash the subpoena. Both the Commission and the court of appeals respond to Petitioners' allegations by pointing to the Erasmus Report as negating any malicious intent, and do not attempt to explain the simultaneity of the Government's investigations. In fact, as the Third Circuit recognized in *SEC v. Wheeling-Pittsburgh Steel,* the subpoena may be invalid even if the agency merely acted at the behest of an outsider without itself making an independent determination that the investigation was warranted. That the investigation may also have been justified on the basis of underlying facts does not excuse the agency from making that independent determination.

5. The Matters Sought To Be Discovered Are Not Privileged.

The Commission argues, for the first time in these proceedings, that the discovery sought by Petitioners would infringe upon the "privileged area of the administrative

deliberative process," Brief in Opp. at 15. The cases cited by the Commission in support of this contention, however, are wholly inapposite. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), for example, involved an FOIA request, and this Court explicitly noted that discovery unavailable under exemption 5 to the FOIA might still be available to some litigants. 421 U.S. at 149 n.13. *United States v. Morgan*, 313 U.S. 409 (1941), from which the Commission provides copious quotations, *see* Brief in Opp. at 15 n.16, involved rate fixing by the Secretary of Agriculture. Moreover, *Morgan* has been qualified and interpreted by this Court's more recent pronouncement in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). In *Overton Park*, the Court held that the "presumption of regularity" accorded government processes could not be used to "shield [those processes] from a thorough, probing, in-depth review." 401 U.S. at 415. The Court explicitly limited *Morgan*, rejecting any *per se* prohibition on inquiries into mental processes. *Id.* at 420.

CONCLUSION

For the foregoing reasons, and those stated in our Petition for Writ of Certiorari, the Writ should be granted and the decision of the United States Court of Appeals for the District of Columbia reversed.

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